TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 226.

PABLO MAESE, JOSÉ L. LOPEZ, DIONICIO GONZALEZ, AND JESUS MARIA TAFOYA, APPELLANTS,

vs.

BINGER HERMAN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE UNITED STATES, AND ETHAN ALLEN HITCHCOCK, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 14, 1901.

(18,018.)

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(18,018.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 533.

PABLO MAESE, JOSÉ L. LOPEZ, DIONICIO GONZALEZ, AND JESUS MARIA TAFOYA, APPELLANTS,

vs.

BINGER HERMAN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE UNITED STATES, AND ETHAN ALLEN HITCHCOCK, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 21, 1901.

1 In the Court of Appeals of the District of Columbia.

PABLO MAESE ET AL., Appellants,
vs.
BINGER HERMAN, Commissioner, &c., ET AL. } No. 971.

Supreme Court of the District of Columbia.

PABLO MAESE ET AL.
vs.
BINGER HERMAN, Commissioner of the General Land Office of the United States, *et al.* } No. 20276. Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Bill.

Filed March 22, 1899.

In the Supreme Court of the District of Columbia, the — Day of March, 1899.

PABLO MAESE, JOSÉ L. LOPEZ, DIONICIO GONZALEZ, Jesus Maria Tafoya
vs.
BINGER HERMAN, Commissioner of the General Land Office of the United States, and Ethan Allen Hitchcock, Secretary of the Department of the Interior of the United States. } No. 20276, Equity Docket 46.

To the supreme court of the District of Columbia, holding an equity court:

The plaintiffs state as follows:

1. They and each of them are citizens of San Miguel county, in the Territory of New Mexico, and reside on what is known as the Las Vegas land grant, situated in said county, and they bring this suit in their own right as heirs of the original grantees of said grant and on behalf of all the other heirs and assigns of the original grantees of said grant who now have any interest therein and
2 who have a common interest with said plaintiffs and who will bear their *pro rata* share of the costs herein.

2. The plaintiffs further state that all the heirs and assigns of the original grantees in and to said grant are too numerous to be made parties by name.

3. The defendant Binger Hermann is a citizen of the United States and a resident of the District of Columbia, and is sued in this action as the Commissioner of the General Land Office of the United States; the defendant Ethan Allan Hitchcock is also a citizen of the United States and a resident of the District of Columbia, and is sued in this action as the Secretary of the Department of the Interior of the United States.

4. On the 20th day of March, 1835, Juan Dios Maese, Miguel Archuleta, Manuel Duran, and Jose Antonio Cassaos, for themselves and on behalf of twenty-five men, appeared before the corporation of El Bado, in the Territory of New Mexico, Mexico, and to said corporation of El Bado presented their petition, according to law, wherein they stated that, having registered a vacant and uncultivated piece of land, commonly known by the name of Las Vegas, on the Galinas river, which they desired for the cultivation of moderate crops and for pasture and watering places, *and* they then and there petitioned said corporation for said tract of land, the same being then and there under the jurisdiction of the corporation of El Bado and bounded as follows: "On the north by the Sapello river, on the south by the boundary of the grant of Don Antonio Ortiz, on the east by the Aguage de la Zegua, and on the west the boundary of the grant to San Miguel del Bado," and they asked that the same be granted and set off to them, and that they be given possession thereof. The tract of land contained within said boundaries is the same tract of which survey was afterwards made in 1860 and approved by the surveyor general of New Mexico, as will hereafter appear, and contains 496,446.96 acres of land.

5. On the same day on which said petition was presented it was transmitted to the territorial deputation, with the recommendation that the same be granted.

6. On the 23rd day of March, 1835, the application was approved, and the grant was made by the territorial deputation, with the boundaries asked for, with the provision that persons who owned no land were to be allowed the same privilege of settling upon the grant as those who petitioned for it, and that "the pasture and watering places are free to all."

7. On the 24th day of March, 1835, Francisco Sarracino, the acting governor or political chief of the Territory of New Mexico, approved said action of the territorial deputation and directed the constitutional justice of El Bado to place the parties in possession of the lands prayed for.

8. On the 6th day of April, 1835, José Jesus Ulibarri, constitutional justice, went upon the ground with the parties, exhibited to them the original petition praying for the grant, pointed out the boundaries as set forth in the petition, and placed them in
3 complete and full possession of all the land contained in said grant; whereupon said grant became and was in all respects valid, and all the land included within the exterior limits of said grant then and there became and was segregated from the public lands of Mexico and of the Territory of New Mexico, and then and there became the private property of said individual grantees, and

has ever since *hereto* been and still is the private property of said grantees, their heirs and lawful assigns.

9. The plaintiffs aver and charge that they and each of them are legal heirs of certain of the original grantees of and to said Las Vegas land grant—that is to say, the said Pablo Maese is a son of and legal heir to the said Juan de Dios Maese; José L. Lopez is a grandson and legal heir to Francisco Lopez, and is also the administrator of the estate of the said Francisco Lopez; the said Dionicio Gonzalez is a grandson of and legal heir to Santiago Ulibarri, and the said Jesus Maria Tafoya is a grandson of and heir to Antonio Romo; and plaintiffs aver that the said Juan de Dios Maese, Francisco Lopez, Santiago Ulibarri, and Antonio Romo were each and all of the original grantees of and to said Las Vegas land grant; and plaintiffs further aver and charge that the said Juan de Dios Maese, Francisco Lopez, Santiago Ulibarri, and Antonio Romo have all departed this life, and that they each and all died seized and possessed of undivided interests in and to all of the lands embraced and included in said land grant, and that as their heirs respectively said plaintiffs are now the true and real owners of undivided interests in said land, the separate interest therein of each being of the full value of not less than ten thousand dollars.

10. By the treaty and protocol of Guadalupe Hidalgo, made between the United States and Mexico on the 30th day of May, 1848, it is provided that nothing in the treaty shall annul grants of land made in the ceded territory; that all such grants shall preserve the legal value which they possess under Mexican laws, and that legitimate titles to every description of personal and real property existing in the ceded territories are those which were legitimate titles under the Mexican laws in California and New Mexico up to the 13th of May, 1848. The said land included in said grant was in the Territory of New Mexico at and before May 13, 1848, and by the express terms of said treaty, as also by the laws of nations, the validity of said grant was in nowise impaired by reason of the cession of New Mexico to the United States, but, upon the contrary, it was in effect thereby declared upon the part of the United States that they would protect the title of said grantees, their heirs and assigns, in and to all of said land.

Plaintiffs further aver and charge that all of said lands embraced and included in said grant are now reasonably worth and of the value of two millions of dollars.

11. By the 8th section of the act of Congress of July 22, 1854 (10 Stat., 309), it was made the duty of the surveyor general of New Mexico to ascertain the origin, nature, character, and extent of all private claims of grants to land under the laws, usages, and customs of Spain and Mexico. He was authorized to issue notices,
4 summon witnesses, administer oaths, etc., and required to make full reports to the Secretary of the Interior to be laid before Congress for final action "with a view to confirm *bona fide* grants" originating before the cession by the treaty of Guadalupe Hidalgo, denoting the various grades of title, with his decision as to their validity or invalidity; also to report all pueblos, the extent,

locality, number of inhabitants, and nature and title of each, and until final action of Congress on such claims all lands covered thereby should be reserved from sale or other disposal by the Government.

Acting under instructions given to him by the Secretary of the Interior and the Commissioner of the General Land Office, William Pelham, surveyor general of New Mexico, proceeded to make surveys of private land grants in that territory. To this end he gave public notice requiring all parties who claimed grants to appear before him and present their claims by petition, setting forth particularly the grounds and character of their title and the extent of territory embraced within their respective grants. Thereupon Francisco Lopez, Henry Connolly, and Hilario Gonzalez, on behalf of themselves and a large number of the citizens of the United States, residents of the county of San Miguel and its vicinity, filed with said surveyor general their notice and petition making claim to said Las Vegas land grant, alleging that they and the citizens whom they represented were claimants and legal owners of the lands included in said grant, and asking that their claim and title be examined as required by law, and that said grant be confirmed to them.

Upon the presentation of said petition the said surveyor general proceeded to investigate the nature, character, extent, and validity of said grant, and, having made such investigation, he made a report of his findings and conclusions as he was required by law to do. By and in said report the surveyor general found that the grant made to Juan de Dios Maese *et al.*, being that under which plaintiffs now claim, was made in strict conformity to the laws and usages of Mexico at the time, and that the lands are lawfully separated from the public domain and entirely beyond the disposal of the General Government, and that said grant was valid and good.

The report of the surveyor general was in due course of proceeding regularly submitted to Congress for its action thereon, and thereafter, to wit, on June 21, 1860, the Congress of the United States formally approved tne said report of the surveyor general and duly confirmed said grant as made by the constituted authorities of the Territory of New Mexico, as aforesaid, thereby confirming in and to the original grantees named and designated in said Las Vegas grant, their heirs and assigns, their absolute right and title to all of the lands embraced within the aforesaid boundaries and limits, free of all right, title, claim, or control upon the part of the United States.

By law it is made the duty of the Commissioner of the General Land Office to issue a patent to the grantees of all private land grants which have been confirmed by Congress, and the said Commissioner of the General Land Office is, under the law, required to issue patents in all such confirmed private land grants to the grantees named in the original grant, their heirs or assigns, and in the discharge and performance of his duty therein he has no judicial or discretionary powers, but acts ministerially alone in the issuing of such patents.

By the act of Congress confirming said grant, it declared it to be a valid grant, and that the United States did not by the cession of New Mexico acquire any title to said lands or any part thereof, and by said act expressly quitclaimed all right, title, or claim to said lands, and thereby declared that the Government of the United States had no such jurisdiction over said lands as to authorize the Department of the Interior to sit in judgment upon the title or to adjudicate to whom a patent should be issued.

Plaintiffs aver that all the original grantees named and designated in said grant have departed this life, and that they each and all died seized and possessed in common of said lands, except possibly in some instances some of the original grantees had purchased the right, title, and interest of some of their cograntees in said land, and said plaintiffs further aver and charge that they and those whom they represent herein are all either heirs of the original grantees or hold title to said lands by conveyances, mediate or immediate, from original grantees of and to said lands, and that, as heirs and assigns of the original grantees, they are the true and real owners in fee absolute of all of said lands, and as such are entitled to have a patent issued to them for all of said lands.

12. December 17, 1898, upon a petition filed in the Interior Department of the United States, praying that a patent be ordered to be issued to the town of Las Vegas to all the land included in said Las Vegas grant, the Honorable Thomas Ryan, the then acting Secretary of the Interior Department, addressed a letter to the Commissioner of the General Land Office, wherein and whereby the said Interior Department ordered and directed the honorable Commissioner of the General Land Office to issue a patent to said lands to the town of Las Vegas, which order of the Interior Department now remains and continues in full force and effect, not having been set aside, vacated, or omitted.

13. Said plaintiffs are informed and believe, and upon their information and belief they charge the fact to be, that at the date of the making of said Las Vegas grant, as aforesaid, there was no place of collection of people having any legal existence under the laws, customs, or usages of the Republic of Mexico or the Territory of New Mexico known or designated as the town of Las Vegas, nor was there any town by name of Las Vegas on said grant or elsewhere at that time which under the laws in force at that time in the Territory of New Mexico had any legal or corporate existence or which under or by virtue of any law, custom, or usage in force in New Mexico could take or acquire title to lands.

And said plaintiffs allege and charge further that said land
6 grant was not made to any town by name of Las Vegas or by any other name; that the town of Las Vegas nor any other town ever petitioned the surveyor general of New Mexico to investigate the nature, character, extent, or validity of said grant, and that the only petition ever preferred to any surveyor general for such an investigation touching said grant was preferred by individuals representing the original grantees, Juan Dios Maese *et al.*, their heirs and assigns, the same hereinbefore referred to. They aver further

that said surveyor general reported that said grant was made in due form to Juan Dios Maese and his associates, and was to them a valid grant, and plaintiffs aver that said grant was duly and legally confirmed by Congress to the original grantees, the said Juan Dios Maese and his associates, and that it was not confirmed to a town by the name of Las Vegas or to any other town. Said plaintiffs further show that they are informed and believe, and upon their information and belief they charge the fact to be, that there was not on December 17, 1898, any town by name of Las Vegas anywhere in the United States having any legal or corporate existence or any defined boundaries, or that could take or acquire title, either equitable or legal, to any lands whatsoever; and, further, that there was not at the time of the cession of the country included in the Territory of New Mexico to the United States by the Republic of Mexico, or at the time of the confirmation by Congress of the United States of said Las Vegas grant, any such town having any legal or corporate existence or having any defined boundaries, or any place by that name capable in law of acquiring, having, or holding title, either legal or equitable, to the lands included within the Las Vegas grant or any other real estate.

14. Said plaintiffs are advised and believe, and therefore charge, that should a patent be issued naming as the patentee therein the town of Las Vegas that such patent would be void for the reasons hereinbefore stated, and especially for the reasons that there is not now and never was any person, natural or artificial, or any corporation by the name of Las Vegas, and they aver and charge that there is not now and was not on December 17, 1898, and was not at the date of said grant, nor at the date of the confirmation of said grant, any incorporated place by the name of Las Vegas, or any place by that name having any legal existence or any defined boundaries or boundary lines separating it from the surrounding country, nor is there now any town or place by name of the town of Las Vegas capable of taking, acquiring, or holding title to any property, real or personal.

15. Said plaintiffs are informed and believe and so charge that notwithstanding the facts that said grant was neither made to nor confirmed to a town by name of Las Vegas, and that a patent issued to a patentee named as the town of Las Vegas would be void, yet the said Commissioner of the General Land Office, under the said orders and directions of the Interior Department, will so issue the patent if not restrained from so doing by this honorable court.

7 They aver and charge that a patent issued to the town of Las Vegas would cast a cloud and a suspicion upon the title of said plaintiffs and those who are interested with them in said grant as the heirs and assigns of the said original grantees, and will result in irreparable injury to them and to each and all of them.

16. The plaintiffs have duly presented their claim to the said Interior Department and to the Commissioner of the General Land Office to said grant, and in due form asked that a patent to the lands of said grant be issued to the heirs and assigns of said original grantees,

and yet, notwithstanding all the facts as hereinbefore stated, their prayer and request have been ignored and wholly disregarded, and said Commissioner of the General Land Office is now about to issue the patent to said grant to a nonentity, called the town of Las Vegas, in violation of law and in violation of the rights of plaintiffs and to their great and irreparable injury, and will do so unless restrained from so doing by this court.

Prayer.

1. The premises considered, the said plaintiffs pray that process of subpœna may issue out of this honorable court and be served upon said Binger Hermann, the Commissioner of the General Land Office, and upon Ethan Allan Hitchcock, the Secretary of the Department of the Interior, and that they may be made parties defendant hereto and required to answer this bill, but not under oath, the plaintiff hereby waiving oath to the answers of the defendants; that an order may issue temporarily restraining them, and each of them, and all their subordinates in office from issuing a patent to said lands, naming the town of Las Vegas as patentee, wherein or whereby any title to the lands included in said Las Vegas grant might be conveyed or attempted to be conveyed to or invested in the town of Las Vegas, or of making or issuing a patent to said lands to any other than the heirs and assigns of the original grantees, as mentioned and named and described in said grant made, as aforesaid, to Juan de Dios Mease *et al.*, and that on the final hearing hereof the said injunction may be made perpetual, or if it should be that the said Commissioner of the General Land Office may, before the filing of this bill of complaint, have issued a patent to said land to the town of Las Vegas, that this honorable court will order and declare that any such patent is and shall be forever held void and of no effect, and that the same be ordered canceled, and if said Commissioner of the General Land Office has not yet issued a patent to said lands that he be by this honorable court ordered and directed to issue a patent to all of said lands to the heirs, legal representatives and assigns of the said Juan de Dios Maese, Manuel Duran, Miguel Archuleta, José Antonio Cassaos, and those who were associated with them as the original grantees and as representatives of said original grantees, and that their title in and to said lands may be quieted, and

8 said plaintiffs pray for such other and further and general relief as they may show themselves entitled to under the law and the facts; and, as in duty bound, they will ever pray, etc.

JOSÉ L. LOPEZ.
PABLO MAESE.
DIONICIO GONZALES.
JESUS M. TAFOYA.

H. C. BURNETT AND
FRED BEALL,
Attorneys for Plaintiffs.

TERRITORY OF NEW MEXICO, } ss:
San Miguel County, }

We do severally swear that we each have heard read the bill in equity by us subscribed, and know the contents thereof, and that the facts therein stated upon our personal knowledge are true, and those stated upon information and belief we believe to be true.

JOSÉ L. LOPEZ.
PABLO MAESE.
DIONICIO GONZALES.
JESUS M. TAFOYA.

Subscribed and sworn to before me this 1st day of February, 1899.

[SEAL.] EUGENE McELROY,
Notary Public.

Demurrer.

Filed May 2, 1899.

In the Supreme Court of the District of Columbia, This — Day of May, 1899.

PABLO MAESE, JOSE L. LOPEZ, DIONICIO GONZALES, and Jesus Maria Lafoya, Plaintiffs,
vs.
BINGER HERMANN, Commissioner of the General Land Office of the United States, and Ethan Allen Hitchcock, Secretary of the Department — of the United States, Defendants. } Equity. No. 20276.

Come now Binger Hermann, Commissioner of the General Land Office of the United States, and Ethan Allen Hitchcock, Secretary of the Department of the Interior of the United States, defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill of complaint upon and for the following grounds:

First. Said bill of complaint is bad in substance and for want of equity, and does not state facts sufficient to entitle the plaintiffs to the relief prayed for or to any relief.

9 Second. The court has no jurisdiction over the subject-matter of the suit.

Third. There is a defect of parties defendant.

WILLIS VANDEVANTER.
Solicitors for Defendants.

Defendants will urge as reasons for demurrer:

First. That the court cannot interfere with defendants while in the discharge of their duty as public officers in the matter of issuing the patent to said land.

Second. That the courts have no jurisdiction over the matter of issuing patents to lands.

Third. That the town of Las Vegas is a necessary party to said suit, as shown by said bill.

I hereby certify that in my opinion the foregoing demurrer is well founded in law.

WILLIS VANDEVANTER,
Solicitor for Defendants.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

Ethan Allen Hitchcock, who, as Secretary of the Interior, is one of the defendants in the above-entitled suit, being sworn, on oath says that the foregoing demurrer is not interposed for delay.

ETHAN ALLEN HITCHCOCK.

Subscribed and sworn to before me this 2nd day of May, A. D. 1899.

[SEAL.]

W. BERTRAND ACKER,
Notary Public in and for D. C.

Decree, &c.

Filed January 4, 1900.

In the Supreme Court of the District of Columbia.

PABLO MAESE ET AL. vs. BINGER HERMANN ET AL. } Equity. No. 20276.

On this 4th day of January, nineteen hundred, the above-entitled cause came on to be heard upon the demurrer of the defendants to the bill of complaint herein, and after argument of counsel pro and con and due consideration thereof by the court said demurrer is sustained, and the complainants in open court declining to amend their bill of complaint, but standing upon the bill as filed, it is ordered by the court that the said bill of complaint be, and the same is hereby, dismissed at the cost of the complainants.

Thereupon the complainants in open court pray an appeal to the next term of the Court of Appeals of the District of Columbia,
10 which is by the court granted upon complainants entering into bond in the sum of two hundred dollars conditioned and payable according to law.

A. B. HAGNER,
Asso. Justice.

Opinion of Hagner, Justice.

Filed January 11, 1900.

In the Supreme Court of the District of Columbia.

PABLO MAESE ET AL.
v.
BINGER HERMANN ET AL. } Equity. No. 20276.

This bill was filed by Pablo Maese, José L. Lopez, Dionicio Gonzales, and Jesus Maria Tafoya, in behalf of themselves and of other descendants of the original grantees, to obtain an injunction to restrain the authorities of the General Land Office from issuing to the town of Las Vegas a patent for 496,446.96 acres of land in San Miguel county, in the Territory of New Mexico, comprising what is known as the Las Vegas grant, and also to obtain a decree directing those officials to issue a patent for all these lands to the complainants.

The circumstances connected with the controversy may be detailed as follows:

On the 20th of March, 1835, Juan de Dios Maese and three others, for themselves and in the name of twenty-five men, presented a petition to the corporation of El Bado, in the Territory of New Mexico, then belonging to the Mexican Republic, praying for a grant of lands which they described as a vacant and uncultivated piece of land commonly known by the name of Las Vegas, which they solicited for the purpose of planting a moderate crop and for pasture and watering places, and contained within certain designated boundaries. The application was approved by officials called "the territorial deputation," with the conditions that the lands were to be granted not only to the petitioners, but generally to all persons who were destitute of lands to cultivate, and that the pasture and watering places should be free to all. Shortly afterwards the grant was approved by the governor of the Territory, who inserted in his order of approval the suggestion that the proper official should select a site for a town to be built by the inhabitants, and should place them in possession of the described lands. The constitutional justice, in his report of the 6th of April, 1835, set forth his proceedings in execution of the governor's order, among other things, stating that he had arranged that the wall surrounding the town was to be constructed by the individuals to whom land had been allotted.

The treaty of Guadalupe Hidalgo of the 30th of May, 1848, under which the Territory was ceded to the United States, recognized the validity of all Mexican grants within the ceded Territory, with their legal value under the laws of that Republic.

11 With a view of adjusting such claims to lands within the Territory, Congress, by section 8 of the act of July 22, 1854 (10 Statutes, 309), provided that the surveyor general of New Mexico should ascertain upon full examination the origin, nature, character

and extent of all claims within the Territory originating before the cession to the United States, and report the same, with his decision as to their validity or invalidity, and showing the extent and locality of all pueblos existing thereon, which report, in such form as should be prescribed by the Secretary of the Interior, should be laid before Congress for such action thereon as might be deemed just and proper, with a view to confirm *bona fide* grants and give full effect to the treaty of 1848.

On December 18, 1858, the surveyor general transmitted to the Secretary his report, accompanied by a list (marked Exhibit A) of nineteen claims, described by him as "private land claims and town-site grants in New Mexico, as approved or rejected by the surveyor general of said Territory, submitted for the final confirmation of Congress."

The list described the claims by their numbers, and gave to each the name of the respective claimants. The first named was designated as No. 20, and the names of the claimants to the lands therein referred to were given as "town of Las Vegas and Thomas Baca *et al.*" The report declared that each of these conflicting claims was valid in form and for the identical land—the grant to Baca antedating by about ten years that made under the petition of Maese and his associates—so that in the absence of one the other would be good and sufficient; and with this explanation he submitted the claims to Congress for its action in the premises.

The report was laid before Congress by the Secretary of the Interior, which, by the act of 21st June, 1860 (12 Statutes, 71), enacted "that the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor general in his reports and abstract marked Exhibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February, eighteen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be, and the same are hereby confirmed, with the exception of the claim numbered twenty-six, in the name of Juan B. Vigil, which claim, numbered twenty-six, is not confirmed."

The representatives of the Baca claim to the Las Vegas grant having signified their willingness to relinquish their older title in favor of the settlers if allowed to enter an equivalent number of acres elsewhere in the Territory, and the recommendation of the Senate Committee on Private Land Claims that this offer should be accepted having been approved by Congress, it was provided in sec. 6 of the act that the Baca claimants should be allowed to enter an equal quantity of land elsewhere in the Territory in consideration of their relinquishment, and this arrangement, it is conceded, was effected. Thus the confirmation of claim number twenty inured only and conclusively to the benefit of the only other claimant,
12 "the town of Las Vegas," with the qualification expressed in section 4 of the act, "that the foregoing confirmation shall only be construed as quitclaims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever."

By section 2447 of the Revised Statutes of the United States (22d December, 1854, 10 Statutes, 599), it is provided that—

In case of any claim to land in any State or Territory which has heretofore been confirmed by law, and in which no provision is made by the confirmatory statute for the issue of a patent, it may be lawful, where surveys for the land have been * * * made, to issue patents for the claims so confirmed, upon the presentation to the Commissioner of the General Land Office of plats of survey thereof, duly approved by the surveyor general of any State or Territory, if the same be found correct by the Commissioner. But such patents shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land.

As the act of 1860 had made no provision for the issue of a patent, and the surveys of the tract approved by the surveyor general in December, 1860, had ascertained its area, on the 17th of December, 1898, a petition was filed in the name of the town of Las Vegas praying for the issue of a patent for the tract thus confirmed. A petition was also filed in behalf of the present complainants, claiming to be the descendants of the grantees in the Mexican grant of 1835, in which they insisted the patent should be refused to the town of Las Vegas, but should issue to them as such descendants. After argument before the Land Office and the Secretary of the Interior, Mr. Ryan, the acting Secretary, denied the application of the petitioners last named and ordered that the patent should issue to the town of Las Vegas.

The bill before the court narrates the history of the controversy substantially as hereinbefore set forth and charges that the Secretary of the Interior and the Commissioner of the Land Office, unless restrained by the court, will issue the patent as directed in the order of Acting Secretary Ryan, in violation of law and to the irreparable injury of the complainants, and prays that they may be enjoined from issuing a patent for said lands, naming the town of Las Vegas as patentee therein, or in any way whereby any title thereto may be conveyed to or vested in said town or to any other person except the complainants, and that said officials may be directed to issue patent for all said lands to the complainants.

The Secretary of the Interior and Commissioner of the General Land Office interposed a general demurrer to the bill, and the case has been heard upon this state of the pleadings.

The first question arising is as to the jurisdiction of the court to grant the injunction.

It is contended by the complainants, that however the case might stand upon the authorities, if it were on hearing upon con-
13 troverted statements, yet the admissions of the demurrer render such decisions inapplicable.

The particular averments of the bill which are thus relied on are that at the time the grant was issued in 1835 there was no collection of people having any legal or corporate existence under the

laws, customs, or usages of the Republic of Mexico residing upon any location or settlement designated as the town of Las Vegas, established either on said grant or elsewhere, which under or by virtue of any law, custom, or usage in force in Mexico could take or acquire title to lands; that the grant was not made to any town by the name of Las Vegas or by any other name; that no such town ever petitioned the surveyor general to investigate the validity of the grant, and that the only petition for that purpose was preferred by individuals representing the original grant to Maese and his associates and was confirmed by Congress to such original grantee and his associates; that there was not, on 17th December, 1898, any town in the United States of the name of Las Vegas, having any legal or corporate existence or boundaries, that could take any title, equitable or legal, in any lands and that no such town existed at the time of the cession by Mexico or at the time of the confirmation by the act of 1860; and they insisted that any patent that might be issued to the town of Las Vegas would be void in law because of these incapacities and disabilities.

Does the demurrer admit the truth of these averments?

The rule that a demurrer operates as an admission of facts properly pleaded in a bill applies only to such matters as are material, relevant, and which are set forth with legal certainty.

It is also settled that if any repugnancy appears between averments in the bill respecting the contents of a paper and the statements in the instrument itself appearing in the record the latter will prevail, and the demurrer cannot be held to admit the truth of the averments in the bill—99 U. S., 45, U. S. *v.* Ames; and, further, that arguments and inferences from alleged facts are not admitted by a demurrer, unless the facts and circumstances set forth are sufficient to sustain the allegations.

Thus in Dauphin *v.* Key, —, McArthur *v.* Mackey, p. 206, the complainant's averments that he was engaged in a lawful and legitimate business, and not in one illegal and fraudulently conducted by means of false or fraudulent pretenses, promises or representations, were each held to involve a conclusion of law, and to present at least mixed questions of law and fact, and therefore could not be considered as admitted by a demurrer.

And in Smith *v.* Reynolds, 9 Appeals D. C., 272, the court said: "All facts properly alleged are admitted by the demurrer, but not all the legal conclusions that the pleader may have drawn therefrom. The legal construction of the matters of fact alleged is exclusively for the court. And so the construction and effect of all acts of Congress involved is for the court, and also the official acts of Government agents and officers acting thereunder."

14 The point here presented by the complainant is analogous to the familiar principle that an obligor is estopped to deny the recitals in his bond; but the application of that rule depends upon the character of the recital. Thus is Tucker *v.* State of Maryland, 11 Maryland, 322, where a suit was brought upon a bond conditioned for the prosecution of an appeal "to the next county court of Anne Arundel county" (the county courts having

been previously dissolved by a change in the constitution), the Court of Appeals, in deciding that the doctrine of estoppel could not apply, said: "Whether a court exists or not is something more than a mere question of fact, as to which parties may agree or be concluded by admissions. It must depend upon the constitution or laws, and when the court can see that the supposed tribunal is not known to these, it must so decide, no matter what the parties may have admitted by estoppel or agreement."

All the acts of Congress relied upon by either side of this controversy are public statutes, of the contents of which the court must take judicial notice, as it will of the statements contained in and accompanying the official reports referred to in the bill and which form indispensable parts of the history of the case.

1 Greenleaf on Evidence, secs. 4, 6, 479.
3 " " sec. 270.
12 Am. and Eng. Ency., "Judicial notice."

And should there be an averment of fact in a bill in opposition to facts which the court is bound to notice judicially, it will, upon demurrer, be treated as a nullity.

1 Daniel's Practice, 1 Amer. ed. (23–'4).

The complainants must be considered as having vouched into this cause by their bill not only all the statutes, but also all official reports and documents emenating from Government officials, relied upon by them as supporting their case. Unless this is to be assumed by the court, the bill might have been held defective as not presenting that full and candid statement of the facts which is positively required in applications for injunctions, and it would have been justified in sustaining the demurrer, under our equity rules 9, because of their omission to file such documents with their bill.

3 App., 222, Cammack *v.* Carpenter.

The counsel on each side in their arguments, oral as well as written, have acted upon this assumption without objection by the court, and they read at large from the reports of the surveyor general and of the Senate committee and from the various orders of the Land Office and Department of the Interior, with the numerous exhibits accompanying them, as published by Congress. On examination, a striking disagreement appears between the averments of the bill that there never existed such a political or geographical entity as the town of Las Vegas capable of holding any property and the proof contained in these documents and reports.

In such a state of case the court must adopt its own interpre-
15 tation of the documents in preference to the construction sought to be placed upon them by the averments of the complainants.

It appears from these documents that when Juan Antonio Cabeza de Baca, in 1825, presented his application for a grant of these lands by the name of Las Vegas Grandes, he produced proof that his father, Don Luis Maria de Baca, in behalf of himself and his seven-

teen sons, had made a similar application for the lands by that name in 1821, which was ordered by the proper authorities; that it was occupied under the name of Las Vegas by settlers as early as 1821; that the alleged ancestors of the complainants, in 1835, applied for and received under the circumstances and conditions hereinbefore stated the grant of these lands by the name of Las Vegas; that on the 6th of April, 1830, Jose Ulibarri, constitutional justice, certified that on the preceding 29th of March he had assigned parcels of said grant to thirty-one persons, named in a list appended, who then were occupying the lands thus assigned to them in the settlement called "Our Lady of the Sorrows of Las Vegas," in which appear the names of Juan de Dios Maese and Manuel Duran, two of the petitioners for the grant; that José Antonio Cassaos, another of the petitioners, as secretary of the territorial deputation of San Miguel del Bado, signed one of the official orders securing the grant, and that the fourth petitioner, Miguel Archuleta, was one of the persons named in a further list of such assignees and settlers, 142 in number, on the lands described as being in "Vegas" and "the town of Vegas," which document the said Juan de Dios Maese, then a justice of the peace, certified should "be attached to the general grant made to Las Vegas in order that it may so appear and for security in all time to come;" that the surveyor general, in his report of 1858, described the claim and reported in favor of its validity as that of the "town of Las Vegas," accompanying his report with the petition of Lopez and others who claim in sympathy with the complainants under the grant of 1835, describing themselves and a large number of other citizens as "residents of the town of Las Vegas and its vicinity;" that the Senate Committee on Private Land Claims, after careful examination of the subject, recommended the confirmation of the claim, as suggested by the surveyor general, to "the town of Los Begas," or Las Vegas, as it was also described; that the confirmation by Congress was of the claim as described by the surveyor general, viz., to "the town of Las Vegas," and that Congress also, in the 6th section of the law of 1860, provided that the land to be given to the heirs of Baca for the relinquishment of their claim should be an equivalent for the lands in "the town of Las Vegas."

Further, in determining how far the averment of the bill that no such settlement as the town of Las Vegas now exists is consistent with the sources of information that may properly be considered, the court is at liberty to take judicial notice of a variety of things not actually vouched into the case, as the civil divisions of States, as shown by maps and geographical works of general notoriety and approved authority, into counties and towns (12 Am. and Eng. Ency., "Judicial notice," sec. 14, and notes, pp. 169 *et seq.*), the reports
16 of the General Post-Office and Government documents, stating the population of towns and cities, as shown by the national census, as well as the surveys executed under acts of Congress.

Looking at these various sources of information, we learn that the grant of Las Vegas is delineated on the map of New Mexico by Rand and McNally's Atlas, with defined boundaries, as occupying a large part of the county of San Miguel; that there are laid down on

the land two settlements, one by the name of the town of "Las Vegas," the other called "Las Vegas Springs," at each of which there is a post-office, the census return of the first showing a population above 1,500, and the other 500.

In the face of these discrepancies the court must hold the official statements thus brought to its attention to be correct, and the averments of the bill must be discarded, and consequently these objections disappear from the case.

The further objection that a patent granted to the town of Las Vegas would be void by reason of the incapacity of the proposed grantee to receive such a grant is but the statement of a conclusion of law and is unaffected by any supposed admission by the demurrer.

But the court could not decide that any such incapacity exists even if the contradictions we have found in the other parts of the case did not exist. The word "town" has different significations in different countries and in our States; in none of which it means a settlement larger than a village, but unincorporated, and in others it is the equivalent of a township and signifies a subdivision of a county, and may include large villages, which elsewhere would be called towns.

In New Mexico, under the Compiled Laws of 1884, sec. 1670, every municipal corporation having a population of 3,000 and upwards shall be considered a city and each of the population of 1,500 shall be considered an incorporated town; which last would comprehend the town of Las Vegas, according to the census returns.

In some of the documents belonging to the other grants to the different towns referred to in Exhibit A there are detailed statements of the rules laid down for the regulation of these communities that show a form of corporate government well capacitated to receive and administer such grants for the benefit of the inhabitants.

"The Meadows" is not an unusual name for a settlement in this country. There are some half dozen post-offices of that name, and a much larger number altered by prefixes and additions. For a hundred years, perhaps, there has been a settlement within twelve miles of the Capitol, in Prince George's county, Maryland, known as the "Old Fields." I see no reason why a grant to the village by that name by Congress would not be an adequate authorization to the community to hold the title and administer its management.

Whatever peculiarities such a subdivision of territory within New Mexico may possess, they evidently do not render it incapable of taking lands. In the abstract A presented with the report of the surveyor general, eleven out of the nineteen claims therein
17 reported are designated by the name of "town;" and on the report and recommendation of the surveyor general the titles to these towns, respectively, were confirmed by the act of Congress.

If the patent that may be issued in this case is to be held void for the reason stated, the same result would happen in each of the other ten grants to the towns therein named. This I cannot suppose would be just or equitable. The title, as it appears to them, thus communicated to all the other towns would properly be held by them for the

benefit of such of the settlers upon the lands as should show themselves the rightful beneficiaries under the circumstances attending the award of the grants.

In 138 U. S., 656, San Francisco *v.* Le Roy, it appeared that the land claimed by the private suitor was within the territory held by the Mexican pueblo of San Francisco at the time the State was occupied by the forces of the United States. "It was the law of Mexico," said Justice Field, speaking for the court, "that pueblos or towns, when once recognized by public authority, became entitled, for their benefit and that of their inhabitants, to the use of lands constituting the site of such pueblos or towns, and adjoining territory to the extent of four square leagues, to be measured off and assigned to them by officers of the Government." Under these laws the pueblo of San Francisco asserted a claim to four square leagues, and the alcaldes and other Mexican officers from time to time distributed small parcels of the land to the inhabitants for building purposes, and the United States officers, after we took possession, in place of the Mexican officials, exercised the like authority. After the incorporation of the city, a confirmation to it of the pueblo lands was decreed by the courts. This the Supreme Court decided was to the city, "in trust for the benefit of the lot-holders under grants from the pueblo, town, or city of San Francisco or other competent authority, and as to any residue in trust for the benefit of the inhabitants of the city."

Whether this ruling is applicable to the present case it is not for this court now to decide; but surely there would be a stronger probability of accomplishing the equitable adjustment there suggested by the Supreme Court, by confirming the title to the town, which was authorized by Congress to receive it, than if the title should be committed to private individuals, to whom Congress had never directed it to be granted.

The case, when relieved of the supposed difficulties claimed to result from the alleged admissions by the demurrer, is free from difficulty.

Congress in confirming this claim of the town of Las Vegas had made no provision in the confirmatory act for the issue of the patent.

The several duties required to be performed in advance by the surveyor, the surveyor general, and the Commissioner of the General Land Office having been performed by those officials, after the exercise by them of whatever official judgment properly belonged to the duty of each in his official sphere, nothing remained to be done except to issue the patent for the lands thus confirmed.

18 As Congress by this remedial statute evidently intended to impose a duty upon the Commissioner, instead of creating a privilege only, respecting a matter in which the public was so deeply concerned, and in which third persons are entitled to claim the exercise of the power, the words "*it may be lawful*" to issue patents are as mandatory as though the word "*shall*" had been inserted in the clause, or the officer had been "*directed*" to perform the duty, as was the language in Kendall *v.* U. S., 12 Peters, 524; and he would have

been as amenable to a writ of mandamus compelling him to obey the law as the Postmaster General was in the case referred to.

How is it possible, then, for this court to grant an injunction prohibiting him to perform a plain duty which the legislature has imposed upon him, and which he has declared he is willing and ready to discharge?

This question, I conceive, has been conclusively settled by the decisions of the Supreme Court. In 93 U. S., 662, Tameling *v.* U. S., the court, construing this very statute, declared: "No jurisdiction over such claims in New Mexico was conferred upon the courts, but the surveyor general in the exercise of the authority with which he was invested decides them in the first instance. The final action on each claim is reserved to Congress, is, of course, conclusive, and therefore not subject to review in this or any other form." * * *

"The invalidity of the grant has been earnestly and elaborately pressed upon our attention. This was matter for the consideration of Congress, and we deem ourselves concluded by the action of that body. The phraseology of the confirmatory act is, in our opinion, explicit and unequivocal" (p. 663).

In 121 U. S., 366, Maxwell Land Grant case, the court against construing the acts of July, 1854, and of June 21, 1860, quoted the above language and affirmed the decision as in the case of Tameling. In the latter case of Astiazaran *v.* Santa Rita Mining Co., 148 U. S., 83, the court, after citing the two foregoing decisions, says: "The action of Congress, when taken, is conclusive upon the merits of the claim, and if Congress should confirm it, its decision would control."

The objection made by the defendants that the bill is fatally defective because the town of Las Vegas was not made a party defendant is not well taken. Though the suit might have been sustained if the town had been made a party, yet it is not an indispensable or necessary party. The decision of this cause in behalf of the town of Las Vegas can operate only as a relinquishment of title on the part of the United States, but does not conclude the valid adverse rights of third parties. If the court were to command the patent to be issued to the complainants, the rights of the town of Las Vegas "to demand a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land" are especially reserved by section 2447 R. S. U. S., and the right of the complainants to demand such an investigation after the present decision in favor of the town of Las Vegas is equally reserved, and the same security is preserved by sec. 4 of the act of 21st June,
19 1860 (12 Stat., 71), which declares that the confirmations shall be construed as quitclaims or relinquishments on the part of the United States and shall not affect the adverse rights of any other person or persons whatsoever.

I shall sign a decree refusing the relief prayed in the bill and sustaining the demurrer.

A. B. HAGNER,
Asso. Justice.

January 4th, 1900.

Memorandum.

January 24, 1900.—Appeal bond filed.

Order for Preparation of Record.

Filed January 24, 1900.

In the Supreme Court of the District of Columbia, the 24th Day of January, 1900.

PABLO MAESE ET AL.
vs.
BINGER HERMANN ET AL. } Equity. No. 20276.

The clerk of said court will please make up the record in the above-entitled cause for the Court of Appeals, and will include in the record only the original bill and the demurrer and the decree dismissing bill and the written opinion of the justice.

H. C. BURNETT,
FRED BEALL,
Attorneys for Plaintiffs.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the above and foregoing pages, numbered from 1 to 34, inclusive, to be a true and correct transcript of the record, as per directions of counsel for appellant filed in this cause and made part hereof, in cause No. 20276, equity, wherein Pablo Maese *et al.* are complainants and Binger Herman, Commissioner of the General Land Office of the United States, *et al.* are defendants, as the same remain upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 3 day of February, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 971. Pablo Maese *et al.*, appellants, *vs.* Binger Herman, Commissioner, &c., *et al.* Court of Appeals, District of Columbia. Filed Feb. 27, 1900. Robert Willett, clerk.

20 WEDNESDAY, *April 11th, A. D.* 11th 1900.

PABLO MAESE, JOSÉ L. LOPEZ, DIONICIO GONZALEZ, Jesus Maria Tafoya, Appellants,
vs.
BINGER HERMAN, Commissioner of the General Land Office of the United States, and Ethan Allen Hitchcock, Secretary of the Department of the Interior of the United States. } No. 971.

The argument in the above-entitled cause was commenced by Mr. Fred Beall, attorney for the appellants.

THURSDAY, *April 12th, A. D.* 1900.

PABLO MAESE, JOSÉ L. LOPEZ, DIONICIO GONZALEZ, Jesus Maria Tafoya, Appellants,
vs.
BINGER HERMAN, Commissioner of the General Land Office of the United States, and Ethan Allen Hitchcock, Secretary of the Department of the Interior of the United States. } No. 971.

The argument in the above-entitled cause was continued by Mr. Fred Beall, attorney for the appellants, and by Mr. Assistant Attorney General Van Devanter, attorney for the appellees, and was concluded by Mr. H. C. Burnett, attorney for the appellants.

21 PABLO MAESE, JOSÉ L. LOPEZ, DIONICIO GONZALEZ, Jesus Maria Tafoya, Appellants,
vs.
BINGER HERMAN, Commissioner of the General Land Office of the United States, and Ethan Allen Hitchcock, Secretary of the Department of the Interior of the United States. } No. 971.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

The bill in this case was filed in the supreme court of the District of Columbia, by Pablo Maese, Jose L. Lopez, Dionicio Gon-
22 zales, and Jesus Maria Tafoya, against Binger Herman, Commissioner of the General Land Office of the United States, and Ethan Allen Hitchcock, Secretary of the Department of the Interior of the United States, in their respective official capacities, for the purpose of obtaining an injunction to restrain the defendants from issuing a patent for the land embraced in the Mexican land grant, known as the Las Vegas grant, to the town of Las Vegas, situate and located in the Territory of New Mexico, and for a decree directing said defendants to issue a patent for said lands, the extent or quantity thereof being 496,466.96 acres, to the grantees named in the grant, their heirs, legal representatives and assigns, in their own right and as their own absolute property.

The complainants allege in their bill that they are citizens of San Miguel county, in the Territory of New Mexico, and reside on what is known as the Las Vegas land grant, situated in that county, and that they bring this suit in their own right as heirs of the original grantees of said grant, and on behalf of all the other heirs and assigns of the original grantees of said grant who now have any interest therein and who have a common interest with the complainants, and who will bear their *pro rata* shares of the costs of this suit. They further allege that all the heirs and assigns of the original grantees in and to said grant are too numerous to be made parties by name.

Before proceeding to state the particular allegations of the present bill, it may be proper to state that a bill in equity asking an injunction against a former Secretary of the Interior Department and the then Commissioner of the General Land Office, to restrain those officials from an attempted or threatened action with respect to the lands embraced in the Las Vegas grant, has been before this court on a former occasion for consideration. That was a bill filed by Jefferson Raynolds for himself and the other inhabitants of the town of Las Vegas, and of the Las Vegas grant, and by the town of Las Vegas, against the Hon. Hoke Smith, Secretary of the Interior Department, and the Commissioner of the General Land Office, praying an injunction to restrain the execution of an order for the survey of the land embraced in the Las Vegas grant, or from in any manner treating the land included therein as part of the public domain. On demurrer to the bill, the court below held the parties entitled to the relief prayed, and granted the injunction; and this court, on appeal, affirmed the decree. Smith *v.* Raynolds, 9 App. D. C., 261. And from that decree of affirmance an appeal was taken to the Supreme Court of the United States, but before the case could be disposed of on its merits in that court, Secretary Smith retired from office; and under the law as it then stood (but since changed,) the court, following the authority of the preceding case of Warner Valley Stock Co. *v.* Smith, 165 U. S., 28, held that the case abated, and that the bill should be dismissed for want of proper parties. Smith, Secretary, etc., *v.* Raynolds, 166 U. S., 717.

We refer to that case more particularly as containing the facts and history of the grant of Las Vegas, the conflicting claim made in respect thereof under the treaty between the United States and the Republic of Mexico, and the proceedings in regard thereto under the act of Congress of July 22, 1854, and the subsequent confirmation of the claim of the town of Las Vegas, by the act of Congress of June 21, 1860.

The present bill proceeds upon the theory and claim that the grant of Las Vegas was of a purely private nature; that the grant was to certain individuals, and the right to the land became vested in them as their individual property, exclusive of all communal rights; and that the heirs, descendants, representatives and assigns of the original grantees are entitled to a patent for the land, notwithstanding the claim by, and the confirmation of that claim to, the town of Las Vegas, by the act of Congress of June, 1860.

The complainants, by their bill, allege that, by the law, it is made the duty of the Commissioner of the General Land Office to issue a patent to the grantees of all private land grants which have been confirmed by Congress, and that said Commissioner is, under the law, required to issue patents for all such confirmed private land grants to the grantees named in the original grant, their heirs or assigns, and in the discharge of his duty therein he has no judicial or discretionary power, but acts ministerially alone in the issuing of such patents. It is then alleged that, by the confirmatory act of Congress, the Las Vegas grant was declared to be valid, and that the Government of the United States had acquired no right or title to the lands therein embraced, and that the Land Department of the Government had no such jurisdiction over the same as would authorize the officials of that department to adjudicate or determine the question as to whom a patent should of right issue for said land embraced in the grant.

The complainants further allege that all the original grantees named and designated in the grant have died, and that they each and all died seized and possessed in common of said lands, except possibly in some instances some of the original grantees had purchased the right, title and interest of some of their cograntees in said land; and they further aver and charge that they and those whom they represent herein are all either heirs of the original grantees, or hold title to said lands by conveyances, mediate or immediate, from original grantees of said lands, and that, as heirs and assigns of the original grantees, *they are the true and real owners in fee absolute of all of said lands, and as such are entitled to have a patent issued to them for all of said lands.*

It is then alleged that, on December 17, 1898, upon a petition filed in the Interior Department of the United States, praying that a patent be ordered to be issued to the town of Las Vegas for all the land included in said Las Vegas grant, the Hon. Thomas Ryan, the then Acting Secretary of the Interior Department, addressed a letter to the Commissioner of the General Land Office, whereby said Interior Department ordered and directed the Commissioner of the General Land Office to issue a patent for said lands to the town of Las Vegas, which order still remains and continues in full force and effect.

23 Said complainants further allege, that they are informed and believe, and so charge as a fact, that at the date of the making of the said Las Vegas grant by the Mexican officials, there was no place of collection of people having any legal existence, under the laws, customs, or usages of the Republic of Mexico, or of the Territory of New Mexico, known or designated as the town of Las Vegas, nor was there any town by name of Las Vegas on said grant, or elsewhere, at that time, which, under the laws in force at that time in the Territory of New Mexico, had any legal or corporate existence, or which, under or by virtue of any law, custom, or usage, in force in New Mexico, could take or acquire title to lands. And they further allege and charge that said land grant was not made to any town by name of Las Vegas, or by any other name;

that the town of Las Vegas did not, nor did any other town ever petition the surveyor general of New Mexico to investigate the nature, character, extent, or validity of said grant, and that the only petition ever preferred to any surveyor general for such an investigation touching said grant was preferred by individuals representing the original grantees, Maese and others, their heirs and assigns. That said surveyor general reported that said grant was made in due form to said Maese and his associates, and was to them a valid grant; and that said grant was duly and legally confirmed by Congress to the original grantees, and that it was not confirmed to a town by the name of Las Vegas, or to any other town. That complainants are informed and believe, and therefore charge, that there was not, on December 17, 1898, any town by the name of Las Vegas anywhere in the United States having any legal or corporate existence, or any defined boundaries, or that could take or acquire title, either equitable or legal, to any lands whatever; and further, that there was not at the time of the cession of the country, included in the Territory of New Mexico, to the United States by the Republic of Mexico, or at the time of the confirmation of the Las Vegas grant by Congress, any such town having any legal or corporate existence, or having any defined boundaries, or any place by that name, capable in law of acquiring or holding title, either legal or equitable, to the lands included within the Las Vegas grant. And they further charge that they are advised, and so believe, that if a patent be issued to the town of Las Vegas the same would be void, for the reasons hereinbefore stated; and they charge that notwithstanding the facts before stated, the said Commissioner of the General Land Office, under the order and direction of the Interior Department, will issue the patent to the said town of Las Vegas, if not restrained from so doing by the court. They charge that a patent so issued would cast a cloud and a suspicion upon their title and the title of those interested with them, and would result in irreparable injury to them all.

The bill prays for an injunction against the defendants, to restrain them from issuing a patent for said lands to the town of Las Vegas; or, if such patent has been issued, that the same be declared void and of no effect; and that said defendants be ordered and decreed to issue a patent for said lands to the complainants and those having an interest in common with them in said lands.

The defendants appeared and entered a demurrer to the bill, and stated as grounds for the demurrer (1) the want of jurisdiction in the court to grant the relief prayed, or any part thereof; (2) the want of necessary parties to the bill; and (3), that, upon the facts stated in the bill, there is no ground of relief shown—the complainants having no such vested and exclusive rights in the lands as entitle them to a patent therefor.

The court below sustained the demurrer and dismissed the bill; and the complainants have appealed.

Before proceeding to examine and determine the several grounds of demurrer, it would seem to be proper to state in a preliminary way the general principles as to what is and what is not admitted

to be true by the demurrer to the bill; and of what matters and facts the court will take judicial notice without the introduction of formal proof thereof.

It is a well-settled principle in the law of demurrer, that while the demurrer admits as true, for the purposes of the decision invoked by it, all facts well and sufficiently pleaded, yet it does not admit as true mere matters of law which the pleader may think proper to state in his pleadings, nor the conclusions drawn from the facts stated therein. That is for the court exclusively. Nor does the demurrer in any manner admit the correctness of an allegation as to the construction of a statute, or of a grant, or other document, or official act, that may be insisted upon by the pleader, as the foundation of his claim and title, or that may be set up in opposition thereto. That is matter of law for determination by the court. These propositions are too clear to require citation of authority for their support.

And as to the question of what the courts will take judicial notice, it is settled by express authority, that the courts of the United States are bound to take judicial notice of the laws and regulations of Mexico existing prior to and at the time of the cession to this Government of the Territory of New Mexico, by the treaty of Guadalupe Hidalgo, in 1848. United States *v.* Chaves, 159 U. S., 452. And they must also take judicial notice of the facts concerning the land grants by Mexico, which are recited in acts of Congress, and in the records of the General Land Office, or the Department of the Interior. Knight *v.* U. S. Land Association, 142 U. S., 161. In regard to the Las Vegas grant, that has been the subject of both departmental and congressional action. It has been the subject of investigation by the surveyor general of New Mexico, under the act of Congress of July 22, 1854, and by his report was made a subject of record in the General Land Office, from whence it was placed before Congress, and by that body was confirmed by the act of June 21, 1860, by special designation. It has since been repeatedly the subject of official action in the Land Department of the Government. With such publicity and official action in regard to the grant, the grant itself and the facts attending it, are matters of which the courts must take judicial notice.

24 1. With respect to the first of the questions raised under the demurrer, that of the want of jurisdiction of the court over the subject-matter of the bill, in view of the provision of the statute law, and the repeated decisions of the Supreme Court, upon the subject, no very extended discussion of the question is required of this court. By section 2447 of the Revised Statutes of the United States, it is declared and provided, that in case of any claim to land in any State or Territory which has heretofore been confirmed by law, and in which no provision is made by the confirmatory statute for the issue of a patent, it may be lawful, where surveys have been made, to issue patents for the claims so confirmed, upon the presentation to the Commissioner of the General Land Office, of plats, etc., *if the same be found correct by the Commissioner.* "But such patents shall only operate as a relinquishment of title on the part of

the United States, and shall in no manner interfere with any valid adverse right to the same land; nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land."

It is alleged in the bill, as we have seen, that the defendants, in the execution of the functions of their office in the Department of the Interior, are about to issue, or have determined to issue, or, it may be, have issued, a patent to the town of Las Vegas for the land included in the Las Vegas grant, and have refused to issue a patent to the complainants and their associates for said land. And the question is, has a court of equity the power and jurisdiction to restrain this proposed or intended action of one of the executive departments of the Government, and to order the patent to be issued to the complainants? In other words, has a court of equity the power and jurisdiction to control and direct the executive Department of the Interior in the matter of adverse claims to a patent for land, where there has been a confirmation by act of Congress, without directing to whom a patent should issue? The confirmatory act of 1860, makes no provision for the issuing a patent, though it in terms confirms the claim for the land to the town of Las Vegas.

There are many things to be determined as preliminary to issuing a patent. The officer intrusted with the power must determine whether there has been a confirmation, and, as in this case, where there are conflicting claims, to which of the parties claiming the patent the confirmation by act of Congress applies. He must also determine all questions as to the accuracy and validity of the survey, and as to all the conditions upon which the patent can rightfully issue. That being the case, can a court of equity draw all these questions to itself for determination, and thereby exclude the executive department of the Government from the exercise of the function and duty expressly delegated to it by statute? We think not.

This question has been the subject of repeated adjudication by the Supreme Court of the United States, and it has been uniformly held that the courts will not interfere, either by mandamus or injunction, with the exercise, by the executive officers, of duties requiring judgment or discretion. In the case of Litchfield *v.* The Register and Receiver, 9 Wall., 575, this principle was applied to the register and receiver of the land office. That was a case quite analogous to the present, though in some of its facts not so strong for the application of the principle as the present case. The bill was filed against the register and receiver of the land office at Fort Dodge, asking an injunction to restrain them from entertaining and acting upon applications made to them to prove pre-emptions to certain lands which lay within the land district for which they were respectively register and receiver. The defendants demurred to the bill, and the bill was dismissed for want of equitable jurisdiction. The case was taken to the Supreme Court, and that court, speaking by Mr. Justice Miller, said: "The principle has been so repeatedly decided in this court that the judiciary cannot interfere, either by mandamus or injunction, with executive officers such as the respond-

ents here, in the discharge of their official duties, unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here. In the case of Gaines *v.* Thompson, 7 Wall., 347, decided at the last term of this court, the whole subject was fully considered, and the cases in this court examined. The doctrine just stated was announced as the result of that examination. The case of The Secretary *v.* McGarrahan, decided at the present term, 9 Wall., 298, reaffirmed the principle which must now be considered as settled. Both these cases had reference to efforts similar to the present, to control the officers of the Land Department."

Further on in the opinion, the learned justice said: "The very first duty which the register is called upon to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper department? Has it been granted by any act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion. The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservations of the departments and the act of Congress, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and pre-emption, and he asks the court to interfere by injunction to prevent them from determining that question, and that the court shall determine it for them. He says the court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the court in possession of their views, and defend their instructions from the Commissioner, and thus convert the contest before the Land Department into one before the court. This is precisely what this court has decided that no court shall do. After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the Land Department finally decides in his favor, he is not injured. If they give patents to the applicants for pre-emption, the courts can then in the appropriate proceeding determine who has the better title or right. To interfere now, is to take from the officers of the Land Department the functions which the law confides to them and exercise them by the court."

The same principle is reasserted in the recent case of Brown *v.* Hitchcock, 173 U. S., 473, on an appeal taken from this court.

If it be urged that a patent is necessary to enable the complainants to assert their rights in an action at law, the answer to that contention is that it is settled doctrine, that a confirmatory statute passes a title as effectually as if it in terms contained a grant *de novo*, and that a grant may be made by law as well as by a patent issued in pursuance of law. Ryan *v.* Carter, 93 U. S., 78. And this was expressly held by the Supreme Court in respect of the confirmatory act of Congress of June 21, 1860,—the act that confirmed the Las

Vegas grant. Tameling *v.* United States Freehold, etc., Co., 93 U. S., 644, 661.

2. But assuming that there was jurisdiction in the court to take cognizance of the case as presented by the bill, it is then contended by the defendants that the bill is defective, and therefore demurrable, for want of proper and necessary parties defendants thereto. In an application to the Commissioner of the General Land Office to issue a patent under sec. 2447 of the Rev. Stats. U. S., such an objection as this, possibly, would not be entertained. But when a party comes into a court of equity for relief, he must conform to the established rules of proceeding, not only with respect to the subject-matter of the suit so as to furnish a proper foundation for the decree sought, but as to all necessary and proper parties who may be affected by the decree.

In this case, it is very clear that the present defendants have no real interest in the subject-matter of the bill. They do not represent, in any proper sense, the town or the inhabitants of the town of Las Vegas. Their standing in court is simply in their official character, without any real interest in the subject-matter of the suit. The parties in real interest, adverse to the claim of the complainants, are the town of Las Vegas and the inhabitants thereof, and they are not parties and have no representative of their interest before the court. It would certainly appear to be contrary to the first principles of right and justice to proceed to grant the relief prayed for by this bill, in the absence of all representation of those most essentially interested in resisting and defeating the claim of the complainants.

This question was raised and very emphatically decided, in the case already referred to, of Litchfield *v.* Register and Receiver, *supra*. In disposing of this question, the court said: "It appears on its face (referring to the bill), that the register and receiver have no real interest in the matter, but that, persons not named are asserting before them the legal right to pre-empt these lands. These persons are the real parties whose interests are to be affected, and whose claim of right is adverse to the plaintiff. If the court should hear the case, and enjoin perpetually the register and receiver from entertaining their applications, they have no further remedy. That is the initial point of establishing their right, and in this mode a valuable and recognized right may be wholly defeated and destroyed, without the possibility of a hearing on the part of the party interested. This is not a case in which the land officers represent these claimants. They have no such duty to perform. They might let the injunction be issued without defense, and thus a proceeding almost *ex parte* be made to strangle the incipient right of the actual settler on the public lands. If it can be done in this case, it can be done in every other in which a plaintiff is willing to proceed against the officers, without bringing the settlers on the land before the court." It was therefore held that the settlers were necessary parties.

It is alleged, however, that there is no such town as Las Vegas; or, at any rate, there is no incorporated town of that name in New

Mexico, and, consequently, there is no body or legal entity that can be made a party defendant. But the fact of the existence of the town of Las Vegas cannot be denied. It is a fact of which the court must take judicial notice. The existence of the town is recognized by the surveyor general of New Mexico, in his investigation of claims and titles to land under the act of Congress of 1854. It is also fully and repeatedly recognized in the Land Department of the Government, and by Congress in the reports of its committees, and in the act of confirmation of 1860. In addition to this, it appears on the maps of the Territory of New Mexico, and in the gazetteers of the country. And by the census returns of the United States for 1890, it is shown to be a town in San Miguel county, New Mexico, east of Santa Fé, containing, at that time, a population of 2,385 inhabitants; and was a railroad and manufacturing center.

But whether the town of Las Vegas be a municipal corporation, incorporated by virtue of statutory provision or not, is quite immaterial, so far as this case is concerned. In such case as this, it would be sufficient that such a number of the proprietors claiming under the grant embracing the town, or of those holding rights thereunder, were brought before the court, as would fairly represent the interest of all, the interests being of a common character and responsibility. This principle is established by many authorities, and is treated at large, with the citation of cases, in Story's Equity Pleading, in sections 116 to 126. Many instances are given, as where a bill was brought by the parson of a parish against some of the parish-oners to establish a general right to tithes, and the others were held to be bound by the decree in the suit. And so, where there is one general right to demand service from the individuals of a large district, as, for example, a right to demand that all the individuals of a large district should grind all the corn for their subsistence at a particular mill; in such a case the mill-owner may sue a few in equity, to establish his right against all. But so many must be joined, as will fairly and honestly try the legal right. Sto. Eq. Pl., sec. 123; Mayor of York *v.* Pilkington, 1 Atk., 282, 284; Adair *v.* New River Co., 11 Ves., 444; City of London *v.* Richmond, 2 Vern., 421;
26 Milbank *v.* Collier, 1 Collyer, 237; Att'y Gen'l *v.* Wyburgh, 1 P. Will., 599.

In view of all the facts of this case, and the terms of the confirmatory act of Congress, it would certainly not consist with any rational principle of justice that the rights of the people of the town of Las Vegas, whatever may be the nature of those rights, should be subjected to a cloud and embarrassment, and the claimants of those rights be subjected to expensive litigation, by the issue of a patent to the complainants, without an opportunity to the town and its inhabitants to be heard in vindication of their rights. We think the bill is defective for want of necessary parties, and is demurrable for that cause.

3. We might close the consideration of the case here, and affirm the decree below for the reasons we have stated. But as the case may be taken to the Supreme Court of the United States for final review, and the views we have expressed may not be concurred in, and es-

pecially as the appeal to this court was from the judgment of the court below sustaining the demurrer upon the ground that there was no right or title in the complainants that entitled them to a patent for the land, under the confirmatory act of Congress, we shall proceed to the consideration of the third ground of demurrer, which involves the question as to the rights of the complainants and those represented by them to have the patent for the Las Vegas grant issued to them, under the act of confirmation, instead of the town of Las Vegas.

A brief statement of the facts, showing the nature and condition of the grant, as made by the local officials of the Mexican government in New Mexico, would appear to be necessary to a fair understanding of the subject.

In March, 1835, a petition was preferred to the proper authorities in New Mexico for a grant of land under the colonization laws of the Republic of Mexico of 1824, and according to the regulations adopted by that government in 1828. The petition was filed by Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and Jose Antonio Casaos, for themselves and in the name of twenty-five other men, stating that, having registered a vacant and uncultivated piece of land, commonly known by the name of Las Vegas, on the Gallinas river, they solicited said land for the purpose of planting crops, and to have also the necessary land for pasture and watering places, etc., with definite boundaries. They stated that they were willing to bind themselves to receive possession of the land in the name of the federation, and to comply with the reasonable and equitable conditions that might be prescribed. This application, in due course of proceeding, was laid before the territorial deputation of New Mexico; and thereupon it was resolved and ordered, that "the land contained within the boundaries expressed in this petition is granted *not only to the petitioners and the residents of El Bado but also generally to all who may be destitute of lands to cultivate;* provided, 'that the grant to these lands is made on condition that the pasture and watering places are free to all.' In view of all which, the political chief will receive the petitions made, and shall cause them to be provided for, agreeably to what has been ordered. In compliance with instructions let these original proceedings be forwarded to the political chief, who will be pleased to execute what is herein ordered by this deputation, by whose order the foregoing is done.

R. ABREU, *Secretary.* [RUBRIC.]"

Then proceeding was taken by the officials of the Territory to place the parties in possession of the land granted, under the decree of the deputation, and to award to the parties entitled portions of the land, with instructions as to their duties and liabilities under the grant; and such parties were informed and directed, "that the water and pasture were free to all, and that the joint labor should be done by themselves without any dispute, and that the wall surrounding the town marked out should be made by them all, which being done, that they notify the justice, in order that he may mark out to each one equally the portion he is entitled to."

Under the act of Congress of July 22, 1854 (10 Stat., 308), passed to give effect to the provisions of the treaty of Guadalupe Hidalgo, between the United States and the Republic of Mexico, made in 1848, there was a petition filed with the surveyor general of New Mexico, by Francisco Lopez, Henry Connelly and Hilario Gonzalez, on behalf of themselves *and a large number of citizens of the United States, residents of the town of Las Vegas, and its vicinity*, in the county of San Miguel, Territory of New Mexico, representing that they, and the citizens they represented, were the claimants and legal owners of a certain tract of land, lying, etc., which lands were granted by the provincial deputation to Maese and twenty-eight others, and to which petition was appended to the grant under which they claimed. There was also an adverse claim to the same land filed with the surveyor general, by the heirs of Luis Maria Baca, founded upon a grant prior in date to that made to Maese and others.

The surveyor general of the Territory acted upon these claims under the act of 1854; and in his report to the Commissioner of the General Land Office, he stated that: "It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposal of the General Government; and that in the absence of the one the other would be a good and valid grant." But, by this report, the question of the title was referred to the proper tribunals to settle; and these claims with others, referred to in the report, were placed before Congress for its legislative action. In the Committee on Private Land Claims of the Senate, of which committee Senator Benjamin was chairman, the subject of the claims referred to in the report of the surveyor general of New Mexico was fully considered. And that committee, in a report to the Senate, in speaking of the Las Vegas grant, and the adverse claims made to the lands embraced therein, said: "Amongst the claims embraced, however, in the second report and recommendation for confirmation are two which cover the same tract of land, and are embraced in one number, to wit, No. 20. To this tract the two claimants are, first, the heirs of Luis Maria Baca, who claims
under a grant made by the provincial deputation of Durango
27 to said Baca and his seventeen male children, on May 29, 1821, etc. This grant was in fee, and is a genuine and valid title; and, second, the town of Las Vegas. This town claims under a grant made on the 25th of March, 1835, to Juan de Dios Maese and twenty-seven others by the territorial deputation on a petition which represented the land to be public land, and the petitioners were put in possession. The land has been divided out, and several hundred families are located on it.

"The surveyor general, having none but ministerial duties to perform, has recommended the confirmation of both these titles, leaving to the respective claimants the right of adjusting their conflicting claims in the courts; but Congress has other duties imposed on it, and is bound to legislate in such manner as to prevent, if possible, so disastrous a result as the plunging of an entire settlement of families into litigation, at the imminent hazard of being turned out of their homes or made to purchase a second time from

a private owner of lands for which they paid their Government a full equivalent in the labor, risk, and exposure by which they have converted a wilderness, surrounded by hostile savages, into a civilized and thriving settlement; and this can be done with little loss or cost to the Government."

The committee then proceeded to devise and report a method whereby the heirs of Baca should abandon or surrender their older and superior claim to the land, and take other lands of the Government in lieu thereof, so that the Las Vegas grant might be confirmed to the town of Las Vegas, according to the findings and recommendation of the surveyor general; and for that purpose the committee reported an amendment to the bill which had been passed by the House of Representatives and was then pending before the Senate. That amendment was adopted, and the bill as amended was passed into a law. By that law the Las Vegas grant was confirmed to the town of Las Vegas "as recommended for confirmation by said surveyor general in his report and abstract marked Exhibit A, as communicated to Congress by the Secretary of the Interior, etc., and numbered from twenty to thirty-eight, etc., with the exception of claim numbered twenty-six," etc., which was another and different claim from that of Las Vegas. By the sixth section of the confirmatory act of 1860, it was provided, that it should be lawful for the heirs of Luis Baca, "who make claim to said tract of land *as is claimed by the town* of Las Vegas, to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located," etc. The Baca heirs accepted the terms proposed, and made their selection of other lands; and the town of Las Vegas, and the people settled within the limits of the grant of Las Vegas, were thus left in the free and undisturbed possession of the land granted to them and of their homes, with all the rights and privileges professed to be conveyed by the grant. It is manifest beyond doubt as to the purpose and intention of Congress in its action upon the subject. It was not the intention or purpose of Congress thus to provide for the extinguishment of the elder and superior title of Baca's heirs, for the benefit and protection of a few private individuals who might claim individual rights under the grant of Las Vegas, to the exclusion of all claim of the town of Las Vegas, and the inhabitants of the land within the limits of that grant. The inhabitants of the grant have remained undisturbed, and their rights unchallenged, until within a few years past, since which time their rights have been brought into question by parties who attempt to assert and maintain exclusive individual rights to the land embraced within the Las Vegas grant.

By the treaty of Guadalupe Hidalgo the United States stipulated for full and complete protection of all rights of property, perfect or imperfect, held by the inhabitants of the territory ceded, and that such rights should be secured to them, so far as such property was recognized by the laws and constitution of the new government; and for that purpose that the holders should receive from the new authorities such official and documentary evidence of their rights as would assure their full possession and enjoyment. Pueblos or

towns in that respect stood in the same position as private individuals. All their rights of property, legal or equitable, were alike entitled to protection. The confirmation of the claim of title, whatever that title might be, took effect upon the title as it existed at the time of the acquisition of the territory; and, by the subsequent confirmation, the United States recognized the validity of that title at the date of the treaty. Knight *v.* U. S. Land Asso., 142 U. S., 161, 186, 201.

As we have shown, by the recitals of the decree of the deputation of New Mexico, of March 23, 1835, the grant was not only to Maese and his associates named, in their individual rights, but was "to the petitioners and the residents of El Bado, *and also generally to all who might be destitute of lands to cultivate; provided that the grant of these lands is made on condition that the pasture and watering places are free to all.*" The parties entitled under the grant were let into possession under instruction "that they should select a site for a town to be built by the inhabitants; that the joint labor should be done by themselves without any dispute, and that the wall surrounding the town marked out should be made by them all."

Such rights as were conferred by this grant were of a communal nature, and such as are recognized by the modern civil codes of continental Europe; and especially by the laws and customs of Spain, and which have been largely recognized in the laws and ordinances adopted for the settlement and government of her colonies on this continent. Townsend *v.* Greeley, 5 Wall., 326, 336; 1 Domat, Prel., Bk. Til. 2, s. 2, art. 15, par. 111; or p. 148.

As said by the Supreme Court, speaking by Mr. Justice Field, in the case of Townsend *v.* Greeley, *supra*, "It may be difficult to state with precision the exact nature of the right or title which the pueblos held in these lands. It was not an indefeasible estate; ownership of the lands in the pueblos could not in strictness be affirmed. It amounted in truth to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for
28 pasture lands, or as a source of revenue or for other public purposes. This right of disposition and use was, in all particulars, subject to the control of the government of the country." It is very clear therefore, that the land embraced in the grant of Las Vegas was not intended to be assigned to Maese and his associates in absolute property, to them and their heirs, but was intended to be held by them in trust for the benefit of the inhabitants that might settle thereon. This was manifestly the view entertained and enacted into law by Congress, in confirming the right to the town of Las Vegas. This is the view entertained and officially announced and applied by the Land Department of the Government, upon more than one occasion.

In 13 Land Dec., 646, 655, Secretary Noble of the Interior Department has discussed the question of the confirmation of this grant, and to whom the confirmation was made, with great fullness and clearness. He says: "My opinion is that * * * the confirmation was made direct to the town, not only as the most convenient

form of making the confirmation and issuing a patent thereon, but because the town of Las Vegas, acting in the interest and for the benefit of its people, was the proper party to ask for and receive from Congress the relief sought. A patent for said lands should be issued to the town of Las Vegas, so that the proper parties in interest could perfect their titles to their lands. * * *

"As to the point that the town of Las Vegas, not having been incorporated, is a legal nonentity, to which no title would pass under the patent, it may be replied that, if this be true, as matter of fact and law, the consequences would be more far reaching; for Congress, in its wisdom, confirmed the grant, as shown, to the said town, and if there be no such town in existence which can take, there simply has been no confirmation of the grant, and nobody is as yet entitled to a patent. But I do not understand this to be the law of this case.

"Under the Mexican law or system, originally the people were required, for self-protection and other reasons to live in towns while cultivating outlying land, and the general laws of that country gave to such towns or pueblos four square leagues of land for the use of the inhabitants thereof, and occasionally by special concession, as in the present instance, grants of larger area were made for the same purpose. None of these towns were ever incorporated, in the sense in which we use the term, so far as my researches have gone. They were aggregations of people who lived together for mutual protection, and under the laws and customs of that country had officers for the administration of their municipal affairs; but there was no actual charter—no act of incorporation conferred by the superior power of the State—only the implication arising from the recognition of the existence of such towns, with authority to guide their own town affairs.

"This was the condition of things when New Mexico was acquired by the United States, and the legal status of these towns and their capacity to take as confirmees of grants of public lands have been recognized in too many instances by Congress and the executive departments through too long a period of time to be now seriously questioned.

"In the case under consideration the town of Las Vegas was not in existence at the time the original grant was asked for by Maese and his associates. One of the purposes for which the concession was made was to establish that town, and it was established after the manner and under the laws of Mexico, and has had an actual existence ever since. Congress recognized its legal and actual existence, ignored the original petitioners for the grant and confirmed it to the town, and, to that extent, made a change in the trustee. In view of all this it is too late now to say that Las Vegas has no legal existence. If a corporate capacity be necessary to enable the town to take under the grant, every presumption must be that it has the necessary corporate capacity, and the law so implies. Dillon, Mun. Corp., secs. 21, 22. At all events, the town having an actual existence, this department will not challenge its capacity to take what Congress clearly intended to give."

These views of the Secretary of the Department of the Interior were reiterated and inforced by him, on motion for reconsideration of his first decision, and the motion for reconsideration was accordingly overruled. 15 Land Dec., 58.

Upon consideration of the several grounds of demurrer assigned, and of the whole case, we are of opinion that the decree of the court below, dismissing the bill, should be affirmed; and *it is so ordered. Decree affirmed.*

29 TUESDAY, *October* 2*d*, *A. D.* 1900.

PABLO MAESE, JOSÉ L. LOPEZ, DIONICIO GONZALEZ, JESUS MARIA TAFOYA, Appellants,
vs.
BINGER HERMAN, Commissioner of the General Land Office of the United States, and Ethan Allen Hitchcock, Secretary of the Department of the Interior of the United States.
No. 971. October Term, 1900.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

October 2, 1900.

30 Court of Appeals, District of Columbia, October Term, 1900.

PABLO MAESE, JOSÉ L. LOPEZ, DIONICIO GONZALEZ, JESUS MARIA TAFOYA, Appellants,
vs.
BINGER HERMANN, Commissioner of the General Land Office of the United States, and Ethan Allan Hitchcock, Secretary of the Department of the Interior of the United States.

The above-named appellants, Pablo Maese, Jose L. Lopez, Dionicio Gonzalez, Jesus Maria Tafoya, feeling themselves aggrieved by the order, judgment, and decree entered by the Court of Appeals of the District of Columbia on the 2nd day of October, 1900, in the above-entitled cause, do hereby appeal from said order, judgment, and decree to the Supreme Court of the United States, and pray that this their appeal may be allowed, and that the transcript of the record, proceedings, and papers upon which said order, judgment, and decree *was* made, duly authenticated, together with the assignment of errors herewith, may be sent to the Supreme Court of the United States.

H. C. BURNETT &
FRED BEALL,
Att'ys for Appellants.

31 UNITED STATES OF AMERICA:

In the Supreme Court.

PABLO MAESE, JOSE L. LOPEZ, DIONICIO GONZALEZ, JESUS MARIA Tafoya, Appellants,
vs.
BINGER HERMANN, Commissioner of the General Land Office of the United States, and Ethan Allan Hitchcock, Secretary of the Department of the Interior of the United States.

Pablo Maese, Jose L. Lopez, Di-nicio Gonzalez, Jesus Maria Tafoya, appellants, say that in the record of proceedings in the above-entitled case there is manifest error in this, to wit:

1st. The Court of Appeals of the District of Columbia erred in affirming the decision of the supreme court of said District wherein it sustained the demurrer to the bill of complaint and dismissed said bill.

2. The court erred in deciding and holding that the Las Vegas land grant was confirmed by Congress to the town of Las Vegas.

3. The court erred in deciding and holding that said land grant is a community grant.

4. The court erred in deciding and holding that the Las Vegas grant as made by the Mexican government was not intended to be assigned to Maese and his associates in absolute property, to them and their heirs, but that it was intended to be held by them in trust for the benefit of the inhabitants that might settle thereon.

H. C. BURNETT &
FRED BEALL,
Att'ys for Appellants.

(Endorsed:) October term, 1900. No. 971. Court of Appeals of the District of Columbia. Pablo Maese *et al.*, appellants, *vs.* Binger Hermann *et al.*, app'lees. Appeal to the Supreme Court of the United States and assignment of errors. Court of Appeals, District of Columbia. Filed Dec. 13, 1900. Robert Willett, clerk.

32 THURSDAY, *December 13th, A. D.* 1900.

PABLO MAESE, JOSÉ L. LOPEZ, DIONICIO GONZALEZ, JESUS Maria Tafoya, Appellants,
vs.
BINGER HERMAN, Commissioner of the General Land Office of the United States, and Ethan Allen Hitchcock, Secretary of the Department of the Interior of the United States. } No. 971.

On motion of Mr. Fred Beall, attorney for the appellants in the above-entitled cause, it is ordered by the court that said appellants be allowed an appeal to the Supreme Court of the United States on giving bond in the sum of three hundred dollars.

33 Know all men by these presents that we, Pablo Maese, José L. Lopez, Dionicio Gonzalez, and Jesus Maria Tafoya, as principal, and The United States Fidelity & Guaranty Company, incorporated under the laws of Maryland, as surety, are held and firmly bound unto Binger Hermann, Commissioner of the General Land Office of the United States, and Ethan Allan Hitchcock, Secretary of the Department of the Interior of the United States, in the full and just sum of three hundred dollars, to be paid to the said Binger Hermann, Commissioner of the General Land Office, and Ethan Allan Hitchcock, Secretary of the Department of the Interior, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifteenth day of December, in the year of our Lord one thousand nine hundred (1900).

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between the said Pablo Maese, Jose L. Lopez, Dionicio Gonzales, and Jesus Maria Tafoya, appellants, against the said Binger Hermann, Commissioner of the General Land Office of the United States, and Ethan Allan Hitchcock, Secretary of the Department of the Interior of the United States, a decree was rendered against the said Pablo Maese, José L. Lopez, Dionicio Gonzalez, and Jesus Maria Tafoya, affirming a certain decree of the supreme court of the District of Columbia, and the said Pablo Maese, José L. Lopez, Dionicio Gonzalez, and Jesus Maria Tafoya having obtained an appeal to the United States Supreme Court to reverse the decree in the aforesaid suit, and a citation directed to the said Binger Hermann, Commissioner of the General Land Office, and Ethan Allan Hitchcock, Secretary of the Department of the Interior, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Pablo Maese, José L. Lopez, Dionicio Gonzalez, and Jesus Maria Tafoya shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

PABLO MAESE, [SEAL.]
By H. C. BURNETT, *Attorney-in-fact.*
JOSÉ L. LOPEZ, [SEAL.]
By H. C. BURNETT, *Attorney-in-fact.*
DIONICIO GONZALES, [SEAL.]
By H. C. BURNETT, *Attorney-in-fact.*
JESUS MARIA TAFOYA, [SEAL.]
By H. C. BURNETT, *Attorney-in-fact.*
THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By J. S. SWORMSTEDT, *Attorney-in-fact.*

[Seal of United States Fidelity & Guaranty Company.]

[Cancelled internal-revenue stamps.]

Sealed and delivered in the presence of—

FRED BEALL.
KIE OLDHAM.

Approved by—

R. H. ALVEY,
Chief Justice.

[Endorsed:] No. 971. Pablo Maese *et al.*, appellants, *vs.* Binger Herman, Comm'r, &c., *et al.* Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Dec. 20, 1900. Robert Willett, clerk.

34 UNITED STATES OF AMERICA, *ss:*

To Binger Herman, Commissioner of the General Land Office of the United States, and Ethan Allen Hitchcock, Secretary of the Department of the Interior of the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Pablo Maese, José L. Lopez, Dionicio Gonzalez, Jésus Maria Tafoya are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 20th day of December, in the year of our Lord one thousand nine hundred.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

35 I, the attorney of record for the within-named appellees, Binger Hermann and Ethan Allen Hitchcock, do hereby for them and for each of them acknowledge service of the within citation and for them waive copies of same and hereby enter a general appearance for each and both of them.

This December 22, 1900.

WILLIS VAN DEVANTER,
Attorney for Appellees.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec 22, 1900. Robert Willett, clerk.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 34, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Pablo Maese, José L. Lopez, Dionicio Gonzalez, Jesus Maria Tafoya, appellants, *vs.* Binger Herman, Commissioner of the General Land Office of the United States, and Ethan Allen Hitchcock, Secretary of the Department of the Interior of the United States, No. 971, October term, 1900, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 26th day of December, A. D. 1900.

[Seal Court of Appeals, District of Columbia.]

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No., 18,018. District of Columbia Court of Appeals. Term No., 533 Pablo Maese, Jose L. Lopez, Dionicio Gonzalez, & Jesus Maria Tafoya, appellants, *vs.* Binger Herman, Commissioner of the General Land Office, & Ethan Allen Hitchcock, Secretary of the Interior. Filed January 11th, 1901.

[redacted]

No. 446

PABLO MARES ET AL., APPELLANTS,

vs.

SINGER HERMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, ET AL.

MOTION TO ADVANCE.

H. C. BURNETT,
FRED BRALL,
Solicitors for Appellants.

JOHN K. RICHARDS,
Solicitor General, for Appellees.

(18,018.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 2-22-'01

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 533.

PABLO MAESE ET AL., APPELLANTS,

vs.

BINGER HERMANN ET AL., APPELLEES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

Come now all the parties to the above-entitled cause, both appellants and appellees, by their respective attorneys of record, and move this honorable court to advance said cause for hearing and argument, and that the same be assigned for argument to some early day of the present term of the court.

The matter involved in said suit is a Mexican land grant for 496,466.96 acres in San Miguel county, New Mexico, known as the Las Vegas grant.

The principal question involved in the case is to whom the patent to said land should issue, which involves within it the further question of the jurisdiction of the court to direct the Land Department as to whom the patent shall issue.

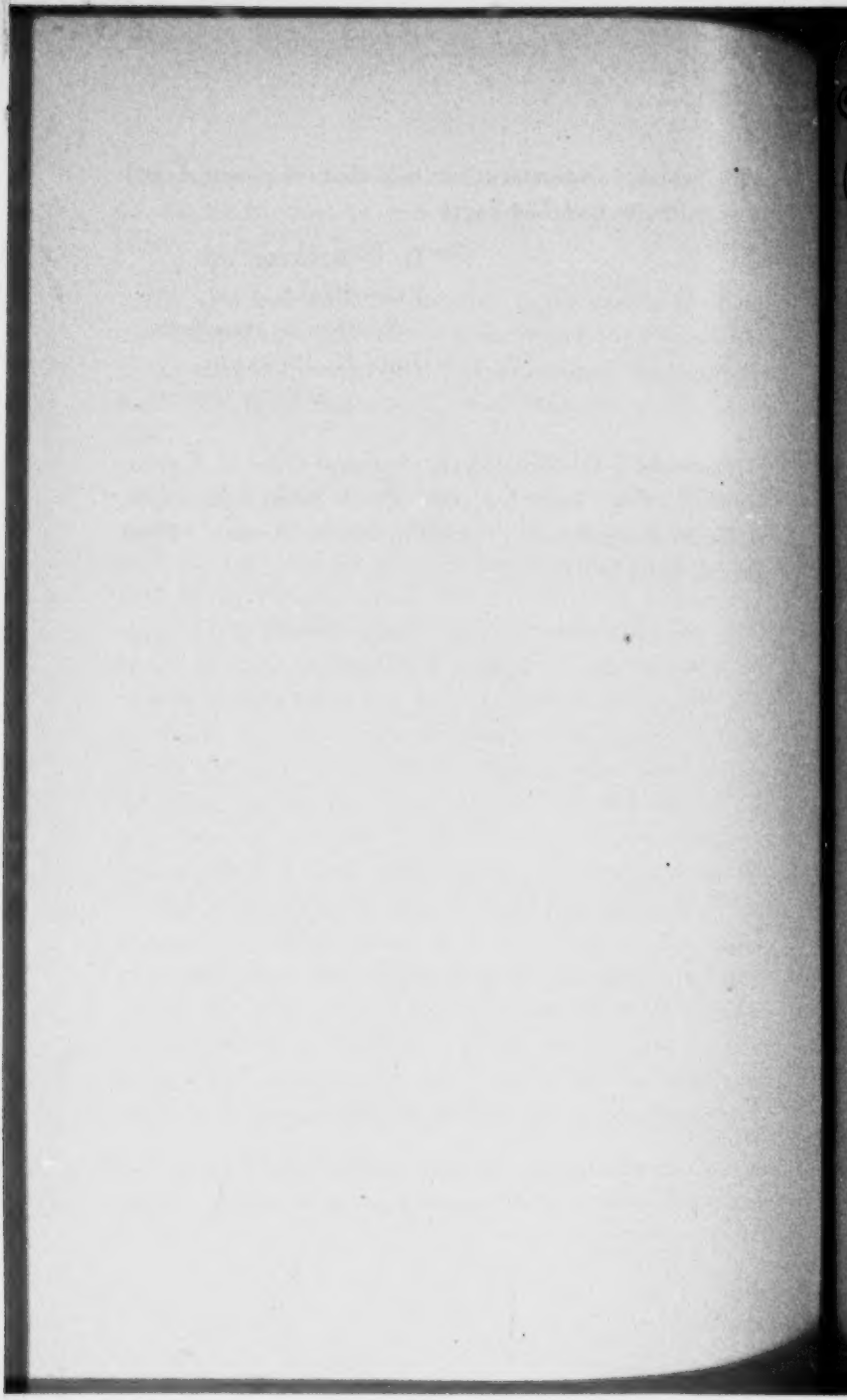
The application to advance is based on the following reasons: The grant was confirmed by act of Congress of June 21, 1860, and the grant surveyed and plat of survey filed in the General Land Office, as required by law, and approved in December, 1860, but no patent has yet been issued to any one, largely on account of the contention of various parties before the Land Department as to how and to whom the patent should issue. The grant includes nearly the entire county of San Miguel, is traversed by the Atchison, Topeka and Santa Fé railroad, and has on it a population of probably 30,000 people or more, many of whom claim to hold parts of said grant by purchase, by descent, or claim of title from Juan de Dios Maese *et al.*, the alleged original grantees. It is important to the entire population that their titles acquired to lands included within the grant should be settled without further delay, and it is also a matter of great public interest that the title to the lands included in said grant should be settled in order to the proper development of that section of country.

The appellants contend that the patent should issue to certain alleged original grantees, their heirs and assigns,

while the Land Department has held that the patent should issue to the town of Las Vegas.

H. C. BURNETT AND
FRED BEALL,
Solicitors for Appellants.
JOHN K. RICHARDS,
Solicitor General.

[Endorsed:] File No., 18,018. Supreme Court U. S., October term, 1900. Term No., 533. Pablo Maese *et al.*, app'ts, *vs.* Binger Hermann *et al.* Joint motion to advance. Filed February 21, 1901.



No. 226.

Brf. of Burnett v Beall for Appts.

FILED
OCT 19 1901
JAMES H. McKENNEY,
Clerk.

Filed Oct. 19, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. ~~332~~ 226.

PABLO MARSE, JOSÈ L. LOPEZ, DIONICIO GONZALES, AND JESUS MARIA TAFOYA, APPELLANTS,

VS.

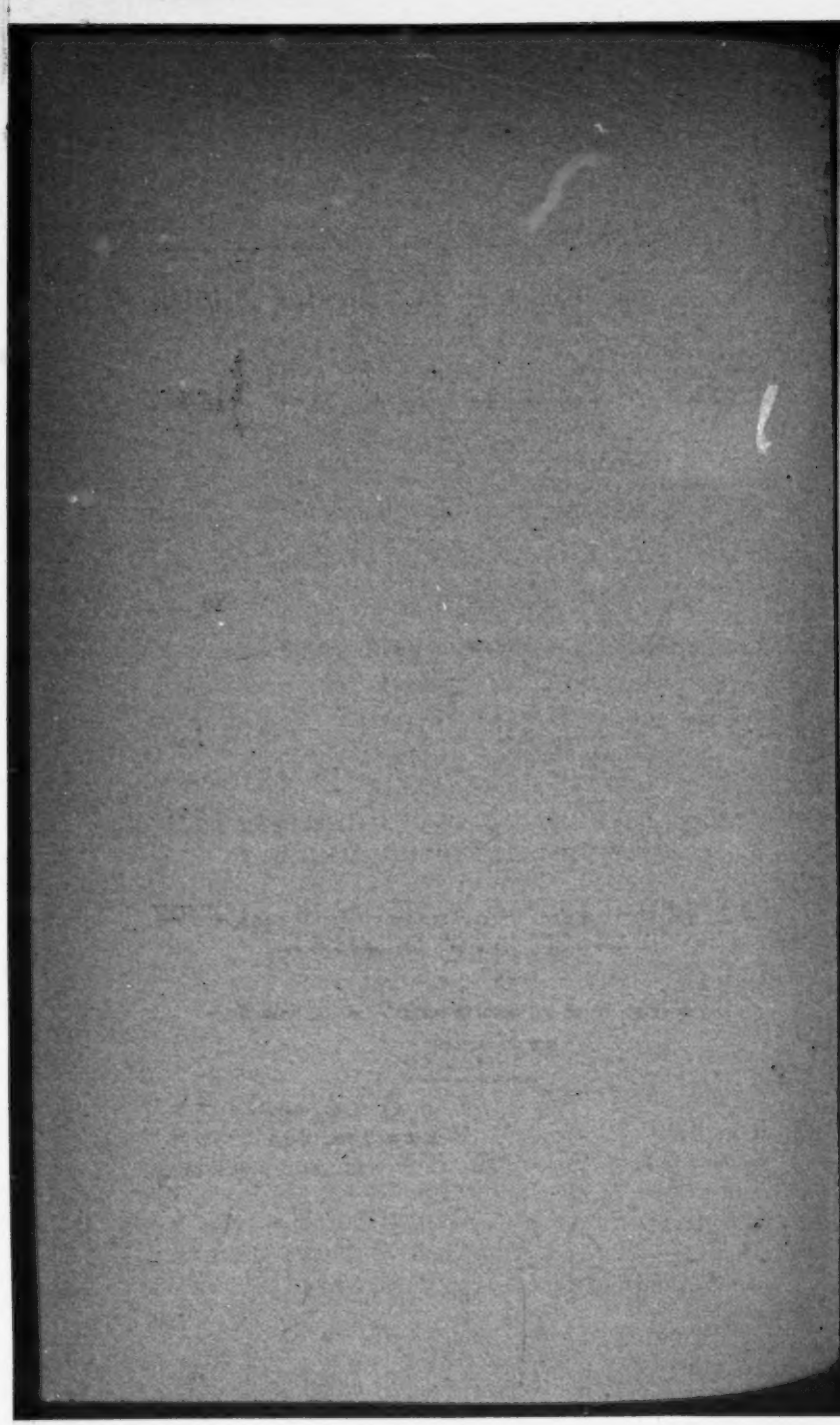
BINGER HERMANN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE UNITED STATES, AND ETHAN ALLEN HITCHCOCK, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT FOR THE APPELLANTS.

H. C. BURNETT,
FRED BEALL,
Appellants' Solicitors.

MILANS, LAW PRINTER, 610 E STREET, N. W., WASHINGTON, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 533.

PABLO MAESE, JOSÈ L. LOPEZ, DIONICIO GONZALES, AND JESUS MARIA TAFOYA, APPELLANTS,

VS.

BINGER HERMANN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE UNITED STATES, AND ETHAN ALLEN HITCHCOCK, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT FOR THE APPELLANTS.

I.

Statement.

Pablo Maese, José L, Lopez, Dionicio Gonzales and Jesus Maria Tafoya, filed their bill in equity in the Supreme Court of the District of Columbia, in their own right as heirs of the original grantees of the Las Vegas land grant and on behalf of all the other heirs and assigns of said grantees, against Binger Hermann, Commissioner of the General Land Office, and Ethan

Allen Hitchcock, Secretary of the Interior of the United States, in their respective official capacities, to obtain an injunction to restrain them from issuing a patent for 496,446.96 acres of land in San Miguel County, New Mexico, comprising what is known as the Las Vegas private land grant, to a so-called town of Las Vegas, and for a decree directing said officials to issue a patent for said lands, to the grantees named in said grant, their heirs, legal representatives and assigns. The original grantees, that is, those names in the grant were Juan de Dios Maese, Manuel Duran, Miguel Archuleta, and José Antonio Casaos, and there were 25 whose names were not stated in the petition for the grant, or the grant itself.

The bill set out the material facts connected with the making of the grant in March, 1835, by the proper authorities of Mexico, the investigation made by the Surveyor–General of New Mexico in 1858, pursuant to the Act of Congress of July 22, 1854, to ascertain the origin, nature, character, and extent of all private claims of grants to land under the laws, usages and customs of Spain and Mexico, and his findings in reference to the Las Vegas Grant as shown by his report, made upon a petition presented to him by Francisco Lopez, Henry Connelly, and Hilario Gonzales, in behalf of themselves and others, claimant's for and legal owners of said land under said grant, wherein said Surveyor–General had reported that he found the grant made to Juan de Dios Maese et al., (being that under which the appellants now claim) was made in strict conformity to the laws and usages of Mexico at the time, and that the lands were thereby lawfully separated from the public domain, and entirely beyond the disposal of the General Government, and that said grant was valid and good. The bill alleges that the report of the Surveyor–General was duly confirmed by Congress, June 21,

1860, that the grant had been surveyed and the survey approved in 1860, and yet notwithstanding said grant was regularly made by the proper authorities of Mexico as above stated, to certain private individuals, and had been confirmed by Congress, and the survey thereof approved, the Commissioner of the General Land Office, acting under the orders and directions of the Secretary of the Interior, was about to issue a patent to all of said lands to a so-called town of Las Vegas.

The bill avers that at the time of the making of the Las Vegas grant there was no place or collection of people having any legal existence under the laws, customs, or usages of the Republic of Mexico, or the Territory of New Mexico, known or designated as the town of La Vegas, nor was there any town by the name of Las Vegas on said grant, or elsewhere, at that time, which under the laws in force at that time in the Territory of New Mexico had any legal or corporate existence, or which under or by any custom or usage in force in New Mexico could take or acquire title, either equitable or legal, to any lands whatsoever, and that a patent issued naming as patentee therein the town of Las Vegas would be void and an irreparable injury to complainants. (Rec., 1–7.)

Complainants pray that the defendants be enjoined from issuing patent to the so-called town of Las Vegas as patentee, and that defendants be ordered to issue patent to said tract of land to the original grantees, their heirs and assigns, and that if the patent had already issued, that the Court declare said patent null and void, and that the defendants be ordered to issue patent as before stated; that is, to the heirs, legal representatives, and assigns of the said Juan de Dios Maese, Manuel Duran, Miguel Archuleta and Jose Antonio Casaos, and those who were associated with them as the original grantees.

The defendants demurred generally to the bill, assigning three causes:

First. Said bill of complaint is bad in substance and for want of equity, and does not state facts sufficient to entitle the plaintiffs to the relief prayed for, or to any relief.

Second. The court has no jurisdiction over the subject-matter of the suit.

Third. There is a defect of parties defendant, (Rec. 8).

The demurrer was sustained, and the complainants declining to amend their bill, it was by the Court dismissed, from which decree of the court complainants appealed to the Court of Appeals of the District of Columbia, which affirmed the decision of the Supreme Court of the District.

The opinion of Justice Hagner, of the Supreme Court of the District, is found on pages 10–18 of the Record, and the opinion by the Court of Appeals is found on pages 20–34 of the Record.

The appellants now bring the case to this Court by appeal and assign four errors, as follows, to wit:

1, The Court of Appeals of the District of Columbia erred in affirming the decision of the Supreme Court of said District, wherein it sustained the demurrer to the bill of complaint and dismissed said bill.

2. The Court erred in deciding and holding that the Las Vegas land grant was confirmed by Congress to the town of Las Vegas.

3. The Court erred in deciding and holding that said land grant is a community grant.

4. The Court erred in deciding and holding that the Las Vegas grant as made by the Mexican Government

was not intended to be assigned to Maese and his associates in absolute property, to them and their heirs, but that it was intended to be held by them in trust for the benefit of the inhabitants that might settle thereon.

II.

History of the Grant, Legislative and Departmental Action Thereon.

The subject-matter of this suit is a Mexican Land Grant made by the proper authorities of Mexico, March 23, 1835, and was confirmed by Congress June 21, 1860. (12 Stats., 71).

As a part of the fruits of the war with Mexico, the province of New Mexico was ceded to the United States by the treaty of Guadalaupe Hidalgo of 1848. The said treaty grants to the residents of the ceded Territory a full and complete enjoyment of their property as ample and as full as enjoyed by the citizens of the United States.

For the purpose of carrying out the obligations of said treaty in the Territory of New Mexico, Congress, July 22, 1854, passed the following Act:

> Sec. 8. *And be it further enacted*, That it shall be the duty of the Surveyor-General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the Treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the

validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act.

Sec. 9. *And be it further enacted*, That full power and authority are hereby given the Secretary of the Interior to issue all needful rules and regulations for fully carrying into effect the several provisions of this act." (10th Stats., p. 309.)

Under the provisions of the 9th section the Secretary of the Interior on the 21st of August, 1854, issued instructions to the Surveyor-General of New Mexico for his guidance in his investigation of Spanish and Mexican grants; these being the only kind of grants that he was authorized to investigate and report upon.

The Secretary in his letter said:

"The duty which this enactment involves upon the Surveyor-General is highly important and responsible. He has it in charge to prepare a faithful report of all the land titles in New Mexico which had their origin before the United States

succeeded to the sovereignty of the country, and the law contemplates such a report as will enable Congress to make a just and proper discrimination between such as are *bona fide* and should be confirmed and such as are fraudulent or otherwise destitute of merit and should be rejected. * * *

The security to private property for which the Treaty of Guadaloupe Hidalgo stipulates is in accordance with the practice of public law as universally acknowledged by civilized nations." * * *

He then cites him to the various decisions of the Supreme Court with reference to land grants in Florida and Louisiana, and also to other legal authorities. He further instructs the Surveyor-General as follows:

"Your docket should be a condensed exhibit of every case of your decision. The claims, both as to grade and dignity, may be qualified by numerals or alphabetically, accompanied by explanatory notes, in such a manner that will show every case confirmed and every one rejected by you.

In the case of any town lots or pasture lots, held under a grant from a corporation or town to which the lands may be granted for the establishment of a town by the Spanish or Mexican Governments, or the lawful authorities thereof, or in the case of any city, town, or village lots, which city, town, or village existed at the time possession was taken of New Mexico by the authorities of the United States, the claim to the same may be presented by the corporate authorities; or where the land on which the said city, town, or village was originally granted to an individual, the claim may presented in the name of said individual; and the fact being proved to you of the existence of said city, town, or village at a period when the United States took possession, may be considered by you as *prima facie* evidence of the grant to said corporation, or to the individual under whom the lotholders claim; and where any city, town, or vil-

lage shall be in existence at the passage of the act of the 22d of July, 1854, the claim for the land embraced within the limits of the same may be proved up before you by the corporate authorities of the said city, town, or village. Such is the practice sanctioned by the act of 3d of March, 1851, for the adjudication of Spanish and Mexican claims in California, and I think its application and adoption proper in regard to claims in New Mexico."

September 11, 1855, Francisco Lopez, Henry Connelly, and Hilario Gonzales, on behalf of themselves and all the other legal owners of the tract of land which was granted to Juan de Dios Maese *et al.* by the authorities of the Mexican Government in 1835, filed their petition before the said Surveyor-General, praying for their claim and title to said tract of land to be examined as required by law, and that said grant be confirmed to them, viz.:

UNITED STATES OF AMERICA, }
Territory of New Mexico. }

To the Hon. William Pelham, Surveyor-General of the Territory of New Mexico:

Francisco Lopez and Henry Connelly and Hilario Gonzales, on behalf of themselves and a large number of citizen of the United States, residents of the town of Las Vegas and its vicinity, in the county of San Miguel, Territory of New Mexico, represent to your honor that they, and the citizens they represent, are the claimants and legal owners of a certain tract of land lying and being situate in the County of San Miguel, in the Territory of New Mexico, which said land was granted by the provincial deputation of said Territory in the year A. D. 1835, to Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and José Antonio Casaos, in their own behalf and that of twenty-five other in-

habitants of said county, which said grant is now filed with this petition, (with leave to refer thereto as often as may be necessary,) and the boundaries of said grant are as follows to-wit: Bounded on the North by the Sapello River, on the South by the boundary grant of Don Antonio Ortiz, on the East by the Aguage de la Llegua, and on the West by the grant of San Miguel del Bado; and the said claimants claim under and by virtue of settlements made under said original grant, and in conformity with the terms of said grant. Your petitioners refer to the laws, usages, and customs of Mexico in force at the time of the making of said grant, to the Spanish laws and regulations which were declared and recognized by the government of Mexico to be inforce and effect. For which power and authority see Collection of the Decrees and Orders of the Cortes of Spain, published by Mariana Galvin, in 1829, page 56, and from page 91 to 101; see also Decrees of Mexico of June 4 and September 18, 1823, pages 123 and 180, 2 vol. Collection of Decrees; see also Ordenanzas de Tierras y Aguas, page 8; Peters' Reports, 436; 1 Howard, 24; 15th Peters, 130; 6th Peters, 621; Holcomb's U. S. Digest, pages 358 to 363.

The said claimants cannot show the quantity of land embraced in said grant, except as the same are set forth in the boundaries of said grant, nor can they furnish a plat of survey of said grant, as no survey of said land has ever been executed.

Your petitioners, the claimants, are also informed and believe that Thomas Cabeza de Baca, for himself and others, are claimants also for the lands embraced in said grant and now claimed by your petitioners. Your petitioners pray that their claim and title to said lands be examined as required by law, and that said grant be confirmed to them; and, as in duty bound will ever pray, &c.

SMITH, HOUGHTON & ASHURST,
For Petitioner.

(H. Ex. Doc. 14, 36th Cong., p. 16).

The original grant referred to is in Spanish, and a true translation in English was prepared by the Surveyor-General. The translation is found in H. Ex. Doc. 14, 36th Congress, pages 27 to 30, both inclusive, as follows;

GRANT-TRANSLATION.

Seal Third. (Seal.) Two Rials.

For the years one thousand eight hundred and twenty-six and eight hundred and twenty-seven:

Most Respectful Corporation: The citizens Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and José Antonio Casaos, for themselves and in the name of twenty-five men, appear before your honorable body in the best and most approved manner, and according to law, and state that having registered a vacant and uncultivated piece of land commonly known by the name of Las Vegas, on the Gallinas River, about five leagues distant from this settlement, which land we solicit for the purpose of planting a moderate crop, to have also the necessary land for pasture and watering places, and having the following boundaries: On the north the Sapello River, on the south the boundary of the grant made to Don Antonio Ortiz, on the east the Aguage de la Zegua, and on the west the boundary of the grant to San Miguel del Bado, which grant we pray for without injury to any third party, binding ourselves to receive possession in the name of the federation, and to comply with the reasonable and equitable conditions which your excellency, by virtue of the authority conferred upon you, may be pleased to establish for the grant of the land, being pleased to lay this, our petition, before the most excellent territorial deputation, having first obtained the customary

report which by law is intrusted to your excellency, in order that that most excellent body may order the aforesaid grant to be made to us, in which the advancement of agriculture and the well being of several families without occupation are interested. Therefore, we request and pray your excellency, that considering us as having presented ourselves, to yield to our petition, which we swear not to be done in malice; and in whatever may be necessary, etc.

JUAN DE DIOS MAESE. (Rubric.)
MANUEL DURAN. (Rubric.)
MIGUEL ARCHULETA. (Rubric.)
JOSÈ ANTONIO CASAOS. (Rubric.)

SAN MIGUEL DEL BADO, *March 20, 1835.*

San Miguel Del Bado in the Town House on the 20th day of March, 1835.

The foregoing petition, signed by the subscribers thereto, is received. This corporation, desirous of encouraging the advancement of agriculture, and the location of so many families without occupation, and being true that the land solicited as above is public land, and without injury to any third party nor of (torn) X X X let this petition proceed to the most excellent territorial deputation, in order that its excellency, if it sees proper, may provide them with the land prayed for, the entailment of which is earnestly aspired to:

JOSÈ ULIBARRI, *President.* (Rubric.)
FRANCISCO SENA, *First Justice.* (Rubric.)
LEONIOS LUCERO, *Fourth Justice.* (Rubric.)
GERONINO GONZALES, *Second Justice.* (Rubric.)
THOMAS ARAGON, *Attorney.* (Rubric.)
JOSE CANDELARIA FLORES, *Third Justice.* (Rubric.)

Before me, JOSÈ ANTONIO CASAOS.
Secretary of Corporatoon. (Rubric.)

Book 1st, page 6.

OFFICE OF THE MOST EXCELLENT DEPUTATION OF NEW MEXICO,

SANTA FE, *March 23, 1835.*

In consultation of to-day, its excelency has resolved as follows: The land contained within the boundaries expressed in this petition is granted not only to the petitioners and the residents of El Bado, but also generally to all who may be destitute of lands to cultivate, provided, "that the grant to these lands is made on condition that the pasture and watering places are free to all. In view of all which, the political chief will receive the petition which may be made and shall cause them to be provided for, agreeably to what has been ordered."

In compliance with instructions, let these original proceedings be forwarded to the political chief, who will be pleased to execute what is therein ordered by this deputation, by whose order the foregoing is done.

R. ÁBREU, *Secretary.* (Rubric.)

In reference to a petition by the President's (torn) X X X Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and José Antonio Casaos, for themselves and in the name of twenty-five other individuals dated the 20th instant, in which they solicited land in Las Vegas, its excellency, the provincial deputation, has resolved the following in reference to the matter:

(Book 1st, page 6.)

OFFICE OF THE SECRETARY OF THE MOST EXCELLENT DEPUTATION OF NEW MEXICO;

SANTA FE, *March 23, 1835.*

In the consultation to-day its excellency has resolved as follows: The land contained within the boundaries expressed in this petition is granted not only to the petitioners and the residents of El

Bado, but also generally to all who may be destitute of lands to cultivate, provided, "That the grant to these lands is made on condition that the pasture and watering places are free to all. In view of all which the political chief will receive the petition made, and shall cause them to be provided for, agreeably to what has been ordered."

In compliance with instructions, let these original proceedings be forwarded to the political chief, who will be pleased to execute what is therein ordered by this deputation, by whose order the foregoing is done.

R. RBREU, *Secretary.* (Rubric.)

And I communicate it to you for the entire compliance therewith, taking into consideration that the grants are to be made according to the means of each one of the petitioners, in order that they may not leave any land which may be given to them without cultivation. It is also convenient to suggest that you should select a site for a town to be built by the inhabitants, together with such other steps as you may deem proper for the security of the inhabitants, who, on account of settling on the lands indicated, will be included in your jurisdiction; you will therefore adopt such measures as will be most conformable to the laws.

You will retain the petition relative to the matter, and return (torn) as this should be (torn) of the proceedings had by you; all of which you will inform this government so soon as it is in condition to do so.

God and Liberty.

F. SARRACINO. (Rubric.)

SANTA FE, *March 24, 1835.*

On this date the justice of El Bado is notified to proceed according to the directions of the most excellent deputation of this goverment.

SARRACINO. (Rubric.)

(On first page dated March 24, 1835.)

SANTA FE, *March 24, 1835.*

To the Constitutional Justice of Fe Bado:

At this time there is no paper with the third seal in this office.

SARRACINO.

At Nuestra Soñora de los Dolores de Las Vegas, on the sixth day of the month of April, in the year one thousand eight hundred and thirty-five, jurisdiction of San Miguel del Bado, I, the citizen José de Jesus Ulibarri y Duran, constitutional justice, the only one in this jurisdiction, proceeded to this town for the purpose of distributing the lands to twenty-five individuals, mentioned in the petition, dated March 28, 1835, and in general to those who are without lands, not only those within this jurisdiction, but also anyone who may present himself to me who has no occupation; and having examined the land, I took the measures from north to south, after which I made the distribution according to that portion of the colonization law which refers to grants of the public land, complying with the greatest care with the directions of the most excellent territorial deputation of New Mexico, contained in its decree of the 23d of March, 1835, and the decree of his excellency the political chief, citizen Francisco Sarracino, dated the 24th of the same month; each individual received a gratuitous piece of land according to his means, with the understanding that of the lands given to the persons contained in the accompanying list none should remain uncultivated. The whole matter was concluded with the best measures which myself and the parties interested considered the most convenient, in order that each party should be satisfied with his share, setting opposite to each one's name the number of varas he received. The aforementioned list also contains the number of individuals who resided

in the new settlement, and, after having made the distribution, I proceeded to make known to them the petition found at the commencement of this document, assigning them the same boundaries as set forth in the petition. I also informed them that the water and pasture were free to all, and that the joint labor should be done by themselves without any dispute, and that the wall surrounding the town marked out should be made by them all, which being done, that they notify the justice, in order that he may mark out to each one equally the portion he is entitled to. Also, that each one be well provided with arms, the care of which is intrusted to the lieutenant of police of that ward, who shall inspect the arms every eight days, and, should he observe any infraction, to inform this court, as the head of the ward thereof, so as to provide the necessary measures. They were also informed that no one should sell his lands until he acquired the title prescribed by law to all colonists, and, in order that it may so appear at the present time and in the future, placed the originals in the archives under my charge, signing the same with three attending witnesses, in the absence of (torn), there being none in the terms (torn) law, to which I certify.

JOSE JESUS ULIBARRI. (Rubric.)

Attending,

JOSÉ MIGUEL SANCHEZ. (Rubric.)

Attending,

ANTONIO NIETO. (Rubric.)

Attending,

MANUEL DURAN. (Rubric.)

DECREE: The originals annexed to these proceedings, containing eight written pages, are deposited in the archives under my charge. I have so provided, ordered, and signed on said day,

month, and year, and I sign with those in my attendance, to which I certify.

JOSÉ DE JESUS ULIBARRI. (Rubric.)

Attending:

MANUAL DURAN. (Rubric.)

Attending:

ANTONIO NIETA. (Rubric.)

List showing the number of individuals who occupy the new settlement entitled "Nuestra Senora de los Dolores de Las Vegas," and showing the number of yards of land each one has received, which is as follows, to wit:

Then follows the names of thirty-one persons.

The Baca claim referred to in the foregoing petition of Lopez, Connelly and Gonzales, having also been presented, the two were examined and investigated by the Surveyor-General. He took proof as to the "origin, nature, character, and extent" of both claims, copies of which proof accompanied his report made to Congress, December 18, 1858. Said report was transmitted to Congress through the General Land Office, and is as follows:

REPORT.

The Heirs of Luis Maria Baca and the Town of Las Vegas:

The first of the above-mentioned cases was filed in this office on the 19th of June, 1855, and the second on the 11th of September of the same year.

These cases were set for trial at different periods, but owing to the absence of counsel and witnesses were not brought to a final close until the 10th of December, 1858.

The claim of the heirs of Luis Maria Baca is based on the following facts, as set forth in the

original papers filed in the office of the claimants. (Reference to Baca grant omitted.)

The claim of Las Vegas is based on the following proceedings:

On the 20th day of March, 1835, Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and Jose Antonio Casaos, for themselves and in the name of twenty-five others, petitioned the corporation of El Bado for a tract of land for cultivation and pasture situated in the County of El Bado and bounded as follows: On the north by the Sapello River, on the south by the boundary of the grant of Don Antonio Ortiz, on the east by Aguage de la Llegua, and on the west by the boundary of the town of El Bado.

On the same day the corporation of El Bado transmitted the petition to the territorial deputation with the boundaries asked for, with the further provision that persons who owned no lands were to be allowed the same privilege of settling upon the grant as those who petitioned for it.

On the 24th of the same month and year Francisco Sarracino, the acting governor or political chief, directed the constitutional justice of El Bado to place the parties in possession, which was done on the 6th day of April of the same year.

The grant made to Juan de Dios Maese and others is not contested on the ground of any want of formality in the proceedings, but as far as the documentary evidence shows is made in strict conformity with the laws and usages of the country at the time.

Testimony is introduced to show that the heirs of Baca protested in 1837 against the occupancy of the land by the claimants under the latter grant, and that they went upon the land knowing the existance of a prior grant; but as these matters are not deemed to be pertinent to the case so far

as this office is concerned, it is not necessary to comment upon them.

It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposal of the general government, and that in the absence of the one the other would be a good and valid grant; but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby respectfully referred to Congress through the proper channel for its action in the premises.

WM. PELHAM, *Surveyor-General.*

SURVEYOR-GENERAL'S OFFICE, SANTA FE,
NEW MEXICO, *December 18, 1858.*

(H. Ex. Doc. 14, pp. 42–45.)

In 1860 some 32 private land claims, which had been investigated by the said Surveyor-General of New Mexico, were transmitted to Congress for its action. All of the papers pertaining to said grants were transmitted to Congress with his report thereon. The claims were designated by numerals; that is, the claims were numbered 1, 3, 4, 6, &c., to 38, inclusive. Congress passed upon all of these claims in the following act:

CHAP. CLXVII. — *An Act to confirm certain Private Land Claims in the Territory of New Mexico.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor-general of that Territory, and in his letter to the Commissioner of the General Land Office, of the twelfth of January,

eighteen hundred and fifty-eight, designated as numbers one, three, four, six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen and eighteen, and the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract returns of the surveyor-general as number sixteen, be, and they are hereby confirmed: *Provided*, That the claim number nine, in the name of John Scolley and other, shall not be confirmed for more than five square leagues; and that the claim number seventeen, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants.

Sec, 2. And be it further enacted, that in surveying the claim of said John Scolley it shall be lawful for him to locate the five square leagues confirmed to him in a square body in any part of the tract of twenty-five square leagues claimed by him; and that in surveying the claim of said Cornelia Vigil and Ceran St Vrain, the location shall be made as follows, namely: The survey shall first be made of all tracts occupied by actual settlers holding possession under titles or promises to settle, which have heretofore been given by said Vigil and St. Vrain, in the tracts claimed by them, and after deducting the area of all such tracts from the area embraced in twenty-two square leagnes, the remainder shall be located in two equal tracts, each of square form, in any part of the tract claimed by the said Vigil and St. Vrain selected by them; and it shall be the duty of the surveyor-general of New Mexico immediately to proceed to make the surveys and locations authorized and requested by the terms of this section.

Sec. 3. And be it further enacted, That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor-general in his reports and abstracts marked ex-

hibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February, eighteen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be, and the same are hereby confirmed, with the exception of the claim numbered twenty-six, in the name of Juan B. Vigil, which claim, numbered twenty-six is not confirmed.

Sec. 4. And be it further enacted, That the foregoing confirmation shall only be construed as quit-claims or relinquishments, on the part of the United States, and shall not effect the adverse rights of any other person or persons whomsoever.

Sec. 5. And be it further enacted, That it shall or may be lawful for the said Juan B. Vigil or any persons claiming title under him, to institute suit against the United States for the lands claimed and embraced in said claim number twenty-six, not confirmed under the provisions of the third section of this act; said suit to be instituted in the Supreme Court of the Territory of New Mexico, to be defended by the District Attorney of the United States for said Territory, under the direction of the Attorney-General of the United States, with the right of appeal to either party from the decision of the said supreme court to the Supreme Court of the United States, if such appeal be asked for within one year from the rendition of the judgment in said Supreme Court of the Territory of New Mexico, and not thereafter: Provided, That if the suit authorized by the section be not instituted within two years from the passage of this act, the said claimants shall be presumed to have abandoned all right or title to the lands embraced in said claim number twenty-six, and said lands shall thenceforth be held and deemed to be public lands belonging to the United States: And provided further, That in the determination of the suit authorized to be instituted by the terms of this sec-

tion, the courts shall be governed by the Treaty of Guadalupe Hidalgo, the law of nations, the laws, usages and customs of the government from which the claim is derived, the principles of equity and the decisions of the Supreme Court of the United States, so far as they are applicable.

Sec. 6. And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Begas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number, And it shall be the duty of the Surveyor-General of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: Provided, however, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

Approved, June 21, 1860. (12 Stats., p. 71–2.)

July 26, 1860, the Commissioner of the General Land Office addressed a letter to the Surveyor-General of New Mexico, which contains the following information and instructions:

"In advance of the publication of the laws passed by the last Congress, I herewith transmit you a slip of newspaper containing the Act to confirm certain private land claims in the Territory of New Mexico, approved June 21, 1860, showing what particular private land claims were finally confirmed in addition to those confirmed by Act of December 22, 1858. You are directed thoroughly to digest the provisions of the Act of Congress approved June 21, 1860, and to issue appropriate instructions as to the priorities of surveys.

> In this connection I have to draw your special attention to the sixth section of said Act of June 21, 1860. * * * This law gives the land to the Vegas town claim, and allows the Baca heirs to take an equal quantity of vacant land, not mineral, in New Mexico, to be located by them in square bodies not exceeding five in number. To give this law timely effect you will give priority, in surveying private land claims, to this claim, particularly as it is in the vicinity,—about four miles from the outside of the public surveys. You will proceed to have the exteriors of the Las Vegas town claim properly run and connected with the line of the public surveys. The exact area of the Las Vegas town tract having been thus ascertained, the right will accrue to the Baca claimants to locate a quantity equal to the area of the town tract elsewhere in New Mexico as vacant land, not mineral, in square bodies not exceeding five in number."

In obedience to said letter of instructions, the Surveyor-General caused the grant of land to be surveyed and platted, showing the area to contain 496,446 96 acres. The said survey and plat were approved by the Surveyor-General December 8, 1860. The said Surveyor-General as instructed, issued a certificate to the Baca heirs, showing that the Las Vegas grant contained 496,446.96 acres, which fact entitled said heirs to locate an equal number of acres, not mineral, elsewhere within the Territory of New Mexico. Shaw *vs.* Kellogg, 170 U. S., 315.

May 4, 1861, the Surveyor-General reported to the General Land Office said survey, plat, field-notes of the same, together with the accounts and cost of the survey where they were examined and the accounts and cost of the survey adjusted and settled. The papers were marked filed and the case marked closed, and

was thereafter reported by the Commissioner of the General Land Office in his annual reports, as confirmed for 496,446.96 acres.

Without referring specially to all the annual reports of the General Land Office, we copy from the following;

Report of 1869, p. 321.

> "Designation: 20. Name of Tract: Town of Las Vegas. Confirmed: Inhabitants of town. Area in acres: 496,446.96."

Report for 1880, pp. 654, 655.

> "Private land claims against the public domain in New Mexico on file in the office of the United States Surveyor-General for New Mexico, June 30, 1880.
>
> Tract known as the: Las Vegas, town of. Original grantees: Juan de Dios Maese et al. The grant made in: 1835. Made by: Mexico. Reported No.: 20. File No.: 12. The claim filed: September 11, 1885. Approved: December 18, 1858. Transmitted: August 15, 1859. Confirmed: June 21, 1860. The survey made: 1860. Acres: 496,446.96. County: San Miguel."

Report for 1885, pp. 138, 139.

> "List of confirmed and unconfirmed Indian pueblos and private land claims in the Territories of New Mexico and Arizona, and the State of Colorado.
>
> No. of claim: 20. Name of claimant: Inhabitants of the town: Name of claim: Las Vegas: Locality: New Mexico. Date of confirmation: June 21, 1860. Date of patent: ———. Area, 496,446.96. Reference to reports of Surveyor-General: House Ex. Doc. 14, 36th Congress, 1st Session."

The above extracts from the annual reports of the General Land Office show that for a full quarter of a century the grant was regularly reported as confirmed for 496,446.96 acres.

It will be observed that no provision is made by the Act of June 21, 1860, for the issuance of patents to those persons whose private land claims were confirmed thereby, and neither was there any general statute providing for or authorizing the issuance of patents for said confirmed grants at the passage of said Act.

Section 2447, Revised Statutes (taken from the Act of December 22, 1858, 10 Stat. at L., 599, chap. 10), applies only to cases of claims to land "which has heretofore been confirmed by law." (Shaw *v.* Kellogg, 170 U. S., 342.) That is, to claims confirmed by Congress prior to December 22, 1854, and therefore a patent could not issue under said section to those claims confirmed by the Act of June 21, 1860.

March 3, 1869, Congress passed an Act entitled An Act to confirm certain private land claims in the Territory of New Mexico, and provided for the issuance of patents in all private land claims "in said Territory which have heretofore been confirmed by Congress," viz:

> Sec. 2. And be it further enacted, That the Commissioner of the General Land Office shall, without unreasonable delay, cause the lands embraced in said several claims to be surveyed and platted, at the proper expense of the claimants thereof, and upon the filing of said surveys and plats in his office he shall issue patents for said land in said Territory which have heretofore been confirmed by acts of Congress and surveyed, and plats of such survey filed in his office as aforesaid, but for which no patents have heretofore been issued. (15 Stat. at L., 342.)

The heirs, representatives, and assigns of the original grantees of said grant, having made application to the Commissioner of the General Land Office for patent to the land embraced within the survey, approved by said office December 8, 1860, of what is known and designated as the "Las Vegas Grant," containing, as shown by the said approved survey and plat made by the Surveyor-General of New Mexico, 496,446.96 acres, the Hon. Acting Secretary of the Interior, on appeal December 17, 1898, denied the application of petitioners, and directed the Commissioner of the General Land Office to issue the patent for said tract of land to the town of Las Vegas. (27 L. D., p. 666.) Upon the notice of said order being given to appellants this suit was at once instituted.

III.

BRIEF AND ARGUMENT.

The principal question before this Court for determination is: Are the facts which were properly pleaded and set forth in the Bill of Complaint by the complainants, sufficient to give the Supreme Court of the District of Columbia jurisdiction of the subject-matter involved and the parties defendant? In that general question, involving the jurisdiction of the Court, there are included a number of minor questions which it will be necessary to present for consideration, but it is respectfully submitted that there are not as many questions to be considered, as were considered and passed upon by the Supreme Court of the District and the Court of Appeals.

The learned and accomplished attorney who argued this case in the courts below, and both of the tribunals, treated the case largely as though the lands embraced in the Las Vegas grant was public land, constituting a part

of the public domain of the United States. It never was any part of the public domain, but has always been private property, the complete legal title to which was in the original grantees under the Mexican grant. The appellants recognize fully the rule of law contended for by the defendants in the courts below, and as announced by the lower tribunals, that the Land Department alone has jurisdiction over the public lands, and the courts cannot take jurisdiction of them until after the title has completely passed out of the government. This Court has so often announced that doctrine that every member of the profession must be entirely familiar with it. In the administration of the public land laws the jurisdiction of the Land Department is exclusive until the patent issues, and as soon as the patent does issue the Land Department loses its jurisdiction, and that of the courts attach. It is said that there is no hiatus between the jurisdiction of the Land Department in reference to public land matters and the courts, that the one extends up to where the other commences. But that doctrine has no application to the case at bar, here the general jurisdiction of the Land Department never attached to the Las Vegas grant. The title as stated above was complete in the grantees before the cession of New Mexico to the United States. That fact was found by the Surveyor-General of New Mexico and reported to Congress and by the Congress confirmed. In his report he stated as follows:

> "The grant made to Juan de Dios Maese *et al.*, is not contested on the ground of any want of formality in the proceedings, but as far as the documentary evidence shows is made in strict conformity with the laws and usages of the country at the time."

Then referring to the two grants, that is the one to Baca and this one, he stated:

> "It is firmly believed that the land embraced in either of the two grants is legally separated from the public domain and entirely beyond the disposal of the general government, and in the absence of the one, the other would be a good and valid grant."

The fact is so vital in the determination of this case that we desire to emphasize it, that in its consideration it must be borne in mind all the time, that the Land Department never had anything to do with the *title* to this land. That matter was determined outside of the jurisdiction of the Land Department, namely, by Congress, and all that the Land Department ever had to do in reference to the grant up to the Act of Congress of the 3rd of March, 1869, was to instruct the Surveyor-General how he should proceed "to ascertain the origin, nature, character and extent of" the claim "under the laws, usages and customs of * * * * Mexico," and then after the confirmation, to cause the grant to be surveyed and platted.

The Act of Congress confirming this grant did not provide for the issuance of a patent, nor was there then any law in force which did require that a patent should be issued. Learned counsel for the appellees in his argument before the courts below stated that the appellees were preparing to issue a patent under the provisions of Section 2447 of the Revised Statutes, when the bill in this case was filed. Upon reference to that statute it will be seen that it had application only to claims to land which had prior to its enactment been confirmed by law, and in which no provision was made by the confirmatory Statute for the issue of a patent. That section was

enacted December 22, 1854, and as it applied only to land claims which had been confirmed before its passage, of course, it could not apply to the Las Vegas claim, as it was confirmed in 1860. That question was expressly decided by this court in Shaw *vs.* Kellogg, 170 U. S., 312, a case which arose under the act of Congress, that confirmed the Las Vegas grant. There was no express provision in the confirmatory act requiring a survey of any of the lands, claims to which were confirmed by the Act of June 21, 1860, but as stated in Stoneroad *vs.* Stoneroad, 158 U. S., 245, (the subject-matter of which was the Preston Beck claim, being claim No. 1 of the claims confirmed by the same act that confirmed the Las Vegas grant,) that

> "it is not to be presumed that Congress intended by confirming a grant which had never been surveyed, and had, therefore, never been distinctly separated from the public domain, to exempt it from the survey essential to its accurate segregation and delimitation. * * * * The general rule being to exact a survey, the grant here under consideration could only be exempted from this requirement by an expressed statement in the Act of Congress indicating the intention to depart from the rule in the particular instance. No such intention is anywhere expressed in the confirmatory act."

The survey and plat of the Las Vegas grant were made and approved in 1860; that fact is alleged in the bill of complaint, and admitted by the demurrer. It is expressly admitted by the appellees in the motion to advance this case (See page 2,) where it is said, "The application to advance is based on the following reasons: The grant was confirmed by act of Congress of June 21, 1860, and the grant surveyed and plat of survey filed in the General

Land Office, as required by law, and approved in December 1860, but no patent has yet been issued to any one."

The surveying and platting of the grant under the directions of the General Land Office and the filing of the survey and plats in that office were the final acts to be performed by the General Land Office in reference to the Las Vegas grant, as the law then stood. That being done the land to which the grantees already had a legal title was definitely separated from the public domain, and nothing then remained to be done in order to their complete and full enjoyment of the land granted. Nine years subsequent, however, in the wisdom of Congress it was conceived to be necessary or at least proper to the full enjoyment by the confirmees of private land grants in New Mexico that patents should be issued therefor, and accordingly on March 3, 1869, the act was passed providing "that the Commissioner of the General Land Office shall issue patents for said land in said Territory, which have heretofore been confirmed by acts of Congress, and surveyed, and plats of such survey filed in his office, as aforesaid, but for which no patents have heretofore been issued." (15 Stats., 342.) This duty to be performed under this act of Congress is the sole one remaining for the Land Department. The Surveyor-General had years before performed his duties under the act of Congress, and in full compliance with the directions of the Land Department, and made his report to Congress, as he was required to do. Congress had confirmed his report, and the General Land Office had the land surveyed and platted, and forty years ago approved that survey and plat, thus fully completing all their judicial functions in reference to the grant.

The fundamental question now before this court therefore is, What is the character of the act to be per-

formed by the Land Department in issuing the patent in this particular case? Is that act the exercise of a judicial function, or is it purely a ministerial one? The appellants do not contend that they would have a right to a patent if the grant had not been surveyed and platted and the survey and plat filed in the General Land Office, nor do they contend that they would be entitled to maintain their bill if the act of issuing a patent to any extent calls for the exercise of judicial powers; but it is now and has always been contended by the appellants that under the law the act of issuing a patent is a purely ministerial function, and one, therefore, that the courts have the power to control and direct upon a proper statement of facts.

Before taking that question up, however, it may be best for us to call attention to what we regard as a misconception upon the part of the court below as to the scope of the bill of complaint.

IV.

Erroneous Statement of Case by the Court of Appeals.

That the Court of Appeals did not have an entirely correct view of appellants' case. and the questions involved in this controversy, is quite manifest from the following statement:

> It is alleged in the bill, as we have seen, that the defendants, in the execution of the functions of their office in the Department of the Interior, are about to issue, or have determined to issue, or, it may be, have issued, a patent to the town of Las Vegas for the land included in the Las Vegas grant, and have refused to issue a patent to the

complainants and their associates for said land. And the question is, has a court of equity the power and jurisdiction to restrain this proposed or intended action of one of the executive departments of the Government, and to order the patent to be issued to the complainants? In other words, has a court of equity the power and jurisdiction to control and direct the executive Department of the Interior in the matter of adverse claims to a patent for land, where there has been a confirmation by act of Congress, without directing to whom a patent should issue. The confirmatory act of 1860 makes no provision for the issuing a patent, though it in terms confirms the claim for the land to the town of Las Vegas.

There are many things to be determined as preliminary to issuing a patent. The officer intrusted with the power must determine whether there has been a confirmation, and, as in this case, where there are conflicting claims, to which of the parties claiming the patent the confirmation by act of Congress applies. He must also determine all questions as to the accuracy and validity of the survey, and as to all the conditions upon which the patent can rightfully issue, That being the case, can a court of equity draw all these questions to itself for determination, and thereby exclude the executive department of the Government from the exercise of the function and duty expressly delegated to it by statute? We think not.

It is not stated in the bill that the appellants "have refused to issue a patent to the complainants and their associates for said land." The bill does not ask that a patent issue to complainants and their associates, but by reference to the prayer of the bill, found on page 7 of the record, it will be seen that the appellees ask that the Commissioner of the General Land Office " be by this Honorable Court ordered and directed to issue a patent to all of said land

to the heirs, legal representatives and assigns of said Juan de Dios Maese, Manuel Duran, Miguel Archuleta, Jose Antonio Cassaos, and those who were associated with them as the original grantees, and as representatives of said original grantees, and the prayer also is that the defendants be enjoined from " making or issuing a patent to said lands to any other than the heirs and assigns of the original grantees as mentioned and named and described in said grant made, as aforesaid, to Juan de Dios Maese, et al."

In other words the scope and purpose of the bill as shown by all the statements therein, and the prayer is that the patent should issue to the legal representatives of the original grantees in said grant. It was not contemplated by the appellants when they brought their suit that the Court would undertake to determine who were the legal representatives of the original grantees, because that was supposed by them to be beyond the power of the Court. The Court could not say whether the appellants were the real heirs or assigns, and it was no part of the jurisdiction of the court to be exercised in the case to determine for whose benefit a patent would inure. That is a question not now before the court and could not be. It must be determined hereafter. should any controversy on that subject arise.

Among the " many things to be determined as preliminary to issuing a patent," the Court said that the officer intrusted with that power " must also determine all questions as to the accuracy and validity of the survey, and as to all the conditions upon which the patent can rightfully issue," and then from those statements the Court proceeds to say, " that being the case, can a court of equity draw all these questions to itself for determination, and thereby exclude the executive department of the Government from

the exercise of the function and duty expressly delegated to it by statute?" Upon an examination of this statement by the Court of Appeals it will readily be discovered that the court enlarged and multiplied the questions to be determined by the Land Department before it should issue a patent in this case. As we have already shown, every question had been finally settled and disposed of, and every condition required by law complied with, except the single one of issuing the patent. None of the duties were required to be performed by the Land Department that were involved in the case of Litchfield *vs.* The Register & Receiver, 9th Wallace, 575, relied upon by by the Court of Appeals to sustain its position. That was a case in reference to public lands, and we are at a loss to understand how it is possible that the Court of Appeals could view that case as "quite analogos to the present." In our view there is absolutely no analogy between the two cases. That case, as stated by this Court, involved the question of title to land; a question which is not involved in this case at all. That case is stated as follows:

> "The appellant filed his bill in the Circuit Court for the District of Iowa, to restrain the defendants from entertaining and acting upon certain applications to prove pre-emptions to certain lands lying within the district for which they were respectively Register and Receiver.
>
> * * * * * *
>
> The lands in controversy are situated within the land district over which these officers have authority to receive proof of pre-emption and grant certificate of entry. There is within that district, of course, lands open to sale and pre-emption. There would be no use for the Land Office if there were not. The very first duty which the register is called on to perform when an application is made to him to enter a tract of land, is to ascertain

> whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper department? Has it been granted by any Act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion. The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservations of the departments and the Acts of Congress, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and pre-emption, and he asks the court to interfere by injunction to prevent them from determining that question, and that the Court shall determine it for them. He says the court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the Court in possession of their views, and defend their instructions from the Commissioner, and convert the contest before the Land Department into one before the Court."

As stated above, the questions before the Register and Receiver were those relating to the title of the land, and the primary question was whether they were public lands or not; that is, whether the title had passed out of the United States or not. Under the law as stated by this Court that was the first question for the Register and Receiver to pass upon, and, of course, it was not within the jurisdiction of the Court to withdraw from the Register and Receiver the determination of that question. Such is not the case here. When the survey of the Las Vegas grant had been made and its area determind in order that the Baca heirs might get an equivalent amount of land, the lines having been run by the Surveyor-General around the grant, thus definitely separating it from the public

domain, and when the survey and plats had been filed in the General Land Office, nothing could possibly remain to be done requiring the exercise of any judicial function upon the part of the General Land Office, and had it not been for the Act of March 3, 1869, that office would not have been called upon to perform any other duty whatsoever.

The Court of Appeals also cites the case of Brown *vs.* Hitchcock, 173 U. S., 473, and bases its opinion upon the principles declared in that case. The Court said in that case:

> "Under the Swamp Land Act the legal title passes only on delivery of the patent. So the statute in terms declares. The second section provides that the Secretary of the Interior, 'at the request of said governor (the governor of the state), cause a patent to be issued to the state therefor, and on that patent the fee simple to said lands shall vest in the said state.'
>
> In this case the record discloses no patent, and therefore no passing of the legal title. Whatever equitable rights or title may have vested in the state, the legal title remained in the United States."
>
> Until the legal title to public land passes from the Government inquiry as to all equitable rights comes within the cognizance of the Land Department."

The title to the land in that case remained in the United States, and, of course, the land remained under the jurisdiction of the Land Department. The principle decided in that case is wholly different from the one involved in the case at bar. The Court said:

> "When the legal title to these lands shall have been invested in the State of Oregon, or in some individual claiming a right superior to that of the

State, then is the inquiry permissible in the courts and that inquiry will appropriately be had in the courts of Oregon, State or Federal.

"We do not mean to say that cases may not arise in which a party is justified in coming into the courts of the District to assert his rights as against a proceeding in the Land Department, or when the Department refuses to act at all."

Citing, among others, the case of Noble *vs.* Union River Logging Railroad Company, 147 U. S., 165.

In that case it is said:

"This case involves not only the power of this court to enjoin the head of a Department, but the power of a Secretary of the Interior to annull the action of his predecessor, when such action operates to give effect to a grant of public lands to a railroad corporation."

With regard to the judicial power in cases of this kind it was held by this court as follows: in 1803 in the great case of Marbury *vs.* Madison, 1st Cranch, 137, that there was a distinction between acts involving the exercise of judgment or discretion, and those which are purely ministerial; that with respect to the former there exists and can exist no power to control the executive discretion, however erroneous its exercise may seem to have been, but with respect to ministerial duties, an act or refusual to act is or may become the subject of review by the courts. The principle of this case was applied in Kendall *vs.* United States, 12 Peters, 524, and the opinion of the circuit court sustained in a proceeding where it had commanded the Postmaster General to credit the relator with a certain sum awarded to him by the Solicitor of the Treasury under an act of Congress authorizing the latter to adjust the claim, this being regarded as purely a ministerial duty.

The Court then referring to the case of Decatur *vs.* Paulding, 14 Peters, 497, and a large number of other cases, proceeded to say:

> "In all these cases the distinction between judicial and ministerial acts is commented upon and enforced.
>
> We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of a head of a Department under any view that could be taken of the facts that were laid before him was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Justice Bradley in La. Board of Liquidation *vs.* McComb, 92 U. S., 531, 'but it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat corelative to each other.

V.

Is the Issuing of a Patent a Judicial or is it a Ministerial Act?

The answer to this question is conclusive of the case at bar. This Court has more than once answered the question, however, and has always, so far as we are able to discover, answered it in the same way, namely, that it is a ministerial act.

In Stoddard *vs.* Chambers, 2 How., 284, it is said on page 317: "The issuing of a patent is a ministerial act, which must be performed according to law."

And in United States *vs.* Stone, 2 Wallace, 525, it is said: "The patent is but the evidence of the grant, and the officer who issues it acts ministerially and not judicially."

The law requires in the issuing of a patent to the Las Vegas grant the performance of a simple, specific act, in no proper sense judicial. True the officer must in this case look to the grant, the report of the surveyor-general, and the act of Congress confirming the report, and see to whom he shall issue the patent, and for what land it shall be issued. He should do that just as the clerk of a court would issue the proper legal process upon an affirmed judgment. If a judgment in an action of ejectment for a number of pieces of land rendered in any United States Circuit Court, wherein the plaintiff had recovered certain tracts of land involved in that suit, but had failed to recover other certain tracts involved in the suit, and the case should be brought to this court, and the judgment of the lower court affirmed, before the clerk of the Circuit Court before whom the judgment had been originally entered could issue a writ of possession to the marshal, directing him to put the plaintiff in possession of the land to which he had been adjudged to be entitled, would have to read, and in sense construe the original judgment, and also the mandate of this Court sent down to the lower court, but in doing that, and in issuing the execution, no one would contend that he was acting otherwise than ministerially. So in the case at bar, the Commissioner of the General Land Office, having before him the entire record, only had to look at the grant, the *quasi* judicial judgment rendered by the Surveyor-General, and

then to the confirmatory act of Congress and issue the patent. He has no discretion in the matter, but must issue the patent "according to law" in order that the same may become "evidence of the grant." The principle contended for is clearly expressed in Roberts *vs.* U. S. *Ex rel.* Valentine, 176 U. S., 222, where this court says:

> "Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the Court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the Court would on that account be powerless to give relief. Such a limitation of the powers of the Court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

But it may be asked how is it if the issuance of a patent in the Las Vegas case is purely a ministerial act, which may be controlled by the courts, that the issuance of a patent in a public land case cannot also be controlled by the courts? The answer is plain and simple. In a public land matter the jurisdiction of the Land Department is never exhausted until the patent issues. All the acts of the department before the patent issues, are in their nature interlocutory, and may, therefore, be recalled and set aside, as was said in the case of New Orleans *vs.* Paine, 147 U. S., 261, in ruling upon the finality of decisions of the Land Department. The Court says: "Until the matter is closed by final action the proceedings of an officer of the department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court upon a final hearing."

But it will not be and is not contended now in view of the record in this case, that the General Land Office has anything whatever to do with reference to this grant, but the issuing of a patent. There is, therefore, nothing to recall or revise. The case last above cited was a suit in equity against the Deputy Surveyor-General of the United States for the State of Louisiana, to enjoin him from surveying and locating a new back line or rear boundary to a French grant, and from dividing into sections lands alleged to belong to the plaintiff, north of and contiguous to such new back line. The case turned upon the power of the court to enjoin the action of an officer of the Land Department in relocating the boundaries of a land grant, and the Court said that obviously the decision of the Surveyor-General approving the act of his deputy, was not a finality. *So long as there was a superior officer whose approval was contemplated by law, or the regulations of the department, no approval by a subordinate officer would operate as a finality.* Then again:

> "It is quite evident from the correspondence that the first survey was never formally approved by the Secretary of the Interior or the Commissioner of the General Land Office, and that no title ever vested in the plaintiff to the lands included in his survey, though defendant having obeyed his instructions was, of course, entitled to his pay. If the department was not satisfied with this survey there was no rule of law standing in the way of its ordering another."

In the case at bar it is alleged that the survey had been made and approved. If that had not been done, as hereinbefore stated, the appellants would not be entitled to maintain their bill. In other words, if there was anything yet to be performed by the Land Department which required the exercise of a judicial discretion, then since the jurisdiction of the two tribunals cannot be exercised at one and the same time over the same thing, the courts would not have jurisdiction. It was also said in New Orleans *vs.* Paine, *supra*, after referring to the case of Noble *vs.* Union River L. R. Co.:

> "So, in this case, if it were made to appear that the former survey had been completed and approved in such manner, and that the lands included within the former survey had become vested in the plaintiff, it is possible that it might be entitled to an injunction against any act which would have the effect of disturbing or unsettling the title thereby acquired."

If a patent shall be issued in this case, not in conformity with law, and not in favor of the rightful parties, it would be calculated to disturb and unsettle the title of the legal representatives of the original grantees, and for that reason we insist that the court should interfere to control the issuance of the patent. And that is a com-

plete answer to the contention of the appellees that no injury can come to the appellants if a patent should be issued, though wrongfully, to the so-called town of Las Vegas. The court below and counsel were both in error in supposing that patent in this case should be issued under Sec. 2447 of the Revised Statutes. It is true that a patent, when issued, will not cut out any adverse rights neither did the confirmatory act cut out any adverse rights; upon the contrary it was expressly provided in that act that it should only operate as a relinquishment by the United States to the lands included in the grant. Still, no one it seems could contend that a patent issued to any other than the rightful persons could do otherwise than operate to the injury of those entitled to the land. It is upon this principle that all bills *quia timet* are based. A patent issued under the authority of the United States Government, to a party not entitled thereto, would, of course, cast a cloud and a doubt and a suspicion upon the title of the real owners, and there is no remedy at law which would be complete or adequate for their protection. A patent issued to the town of Las Vegas could not inure to the benefit of any one deriving title either mediate or immediate from the original grantees. The only remedy which the legal representatives of the original grantees could have, would be to go into court and file a bill to have that patent set aside and vacated. They could take no benefits under that patent at all. Congress, in its wisdom has declared in effect that it is necessary to issue a patent to the grantees, and it is, therefore, a substantial legal right to which they are entitled, and any deprivation of that right would necessarily work an injury which, we submit, is sufficient to give to the courts jurisdiction to prevent the patent being issued to an improper party.

VI.

Is the Town of Las Vegas a Necessary Party?

It is contended by the appellees that the town of Las Vegas is a necessary party defendant, and the failure to make it a party is fatal to the bill.

The case of Litchfield *vs.* The Register & Receiver, *supra*, is relied on to support the doctrine contended for. We do not deem it necessary to say anything more in reference to that case than we have already said, further than to repeat that that was a suit in reference to public lands, in which the bill admitted that there were persons not made parties to the bill who were asserting before the Register and Receiver their right to pre-empt certain lands, which lands were within the jurisdiction of the Register and Receiver, and that was a case in reference to title, while the case at bar has no reference whatever to the title to the lands embraced within the Las Vegas grant, but its sole object is to have the evidence of the title which already exists given to the parties in whom the title does exist. The appellants allege in their bill that there is not now and never was any town named Las Vegas having any legal or corporate existence, or any defined boundaries, or any place by that name capable in law of acquiring, having or holding title either legal or equitable to the lands included within the Las Vegas grant. It is replied that the court may disregard all these allegations in the bill and take judicial notice of the fact that there is such a town, because they say that the census reports, public maps, railroad guides, post office guides and histories all refer to the town of Las Vegas, and that they should prevail over the allegations in the bill. The appellants concede the fact that there is upon the maps a place designated as Las Vegas, and that

there is a post office there, and that the maps place it upon a railroad; and we may go further and concede that there is a large collection of people there, but that does not make a legal town or a municipality competent to take title to property. The fact remains, which is not only true of Las Vegas, but thousands of other places within the United States and its Territories, that there are no boundary lines to the place, nor has it ever been incorporated into a municipality, and does not have any local government; and that fact is not in conflict with the census reports, maps, railroad guides, post office guides or histories. If there was a place known as the town of Las Vegas which was included within defined boundary lines, then we concede that it would be competent to hold property notwithstanding it might not have been organized into a municipality. The condition of Las Vegas has always been similar to that of the towns in Oklahoma, which sprang up in that Territory between the date of its being opened to settlement and the acts of incorporation by the first legislature of the Territory after the organic act of May 2, 1890. The Territory was opened for settlement in April, 1889, but before it was opened for settlement there were already along the Santa Fe Railroad stations called towns; for instance, there was Guthrie, Oklahoma City, and many other places, yet none of them had any organic existence or any defined limits, and they so continued in that unorganized condition until the latter part of 1890, and yet some of them contained during that time an estimated population of eight to ten thousand people. Las Vegas has continued in its present condition for fifty years or more, and remains unorganized to-day. True, there is a town known as East Las Vegas, which, within the last few years, has been organized and has a legal existence.

We respectfully submit that as there is nothing in the history of the country which shows that there was an organized town by the name of Las Vegas, such as could receive title to real property, that the allegations in the bill should have been considered as admitted by the demurrer to be true.

The case of the National Bank *vs.* The County of Yankton, 101 U. S., 129, was cited in the Court of Appeals, and relied on by counsel for the appellees, and from it the argument was made that the existence of the town of Las Vegas was in terms recognized by the 6th section of the confirmatory act, and that it was within the power of Congress, and it did give to the town whatever capacity was necessary to make it the recipient of the intended confirmation. We deny the proposition that it did give to the town the capacity to make it the recipient of the intended confirmation. To have done so it would have had to have fixed the boundaries of the town, and this it did not do. We reply further that if there was no town by the name of Las Vegas, prior to the confirmatory act, then the grant could not have been *confirmed* to it (as Secretary Noble declared was a fact) for that would have been the making of a grant *de novo*.

If, as alleged in the bill, there was no town of Las Vegas with defined boundaries or legal capacity to take title to property or have any existence whatever, then it is submitted that it could not be made a party defendant. Under the allegations in the bill that there is no such place as Las Vegas the defense that the town of Las Vegas was a necessary party, and should have been made such, cannot be set up by a demurrer. That defense could only be made by plea or answer. The appellees might have demurred to all the remaining part of the bill, and filed a plea or answer to that part which alleged the non-

entity of the town of Las Vegas, and that, we submit, is the only way in which they could make that defense.

VI.

How Patents Should be Issued.

Patents should be issued in accordance with the established formula adopted by the General Land Office, and in accordance with the established precedents of the Land Department.

1. Established Formula. With reference to the issuance of patents for Spanish and French land grants arising under the treaty of 1803, the Commissioner of the General Land Office submitted to the Attorney-General of the United States a formula of a patent for his consideration. Said formula was submitted and passed upon by the Attorney-General, May, 1836, and is set out in his opinion, to wit:

> "Are the terms employed in the enclosed patent, to wit: 'Unto the said Rafael Lessieur, or to his legal representatives, and to his or their heirs and assigns forever' so vague and indefinite as to render the patent void for uncertainty? In other words, are the terms employed sufficiently precise to convey the title and indicate the legal grantee?"

The Attorney-General says:

> In considering public grants issued in great numbers by the officers of the Government, in accordance with a certain formula, deliberately adopted by the officers, the courts may with propriety resort to cotemporaneous documents on file in the proper department, for the purpose of ascertaining the intent of the grantors. If that be done in the present case, there will be no diffi-

> culty in ascertaining that the deed was intended to take effect in the manner above suggested.
>
> This form was first adopted to meet those cases in which the party originally entitled, had died; and when that event has not occurred, it would seem to be proper that the patent should be made out to the grantee named in the certificate without any alternative words." (Third Attorney-General's Opinion, p. 111.)

It appears that there arose a contention at or about that date, as to the effect of a patent issued to a person who had died before the issuance of the same, and this contention evidently inspired Congress to pass the Act of May 20, 1836, chap. 76, 5th Stat. at L., p. 31, entitled—"An Act to give effect to patents for public lands issued in the names of deceased persons," and which is carried in the Revised Statute as Section 2448, and is as follows: "Where patents for public lands have been, or may be, issued, in pursuance of any law of the United States, to a person who had died, or hereafter dies, and before the date of said patent, the title to the land designated therein shall inure to, and become vested in, the heirs, devisees, and assignees of said deceased patentee, as if the patent had issued to the deceased during his lifetime."

Justice Nelson, who rendered the opinion of this court, Feb. 13, 1865, in Hogan vs. Page, 2 Wall., 605, says:

> A difficulty had occurred in the office at an early date in respect to the formula of patent certificates and patents. : : : : : : : This difficulty also existed in respect to the Board of Commissioners under the acts of Congress for the settlement of French and Spanish claims. The result seems to have been, after consulting the Attorney-General, that the Commissioner of the Land Office recommended a formula that has since been very generally observed—namely: The issuing of the patent cer-

> tificate, and even the patent, to the original grantee or his legal representatives, and the same has been adopted by the several boards of commissioners. This formula, "or his legal representatives" embraces representatives of the original grantees in the land, by contract, such as assignees, or grantees, as well as by operation of law, and leaves the question open to inquiry in the Courts of Justice as to the party to whom the certificate, patent, or confirmation, should inure.

The formula adopted by the Secretary of the Interior as set out in the case of the "Town of Anton Chico," No. 29, confirmed by the Act of June 21, 1860, is as follows:

> "To —— ——— and —— ———, being the —— men to whom the grant was made by —— —— on —— day of ——— 18——, their representatives and assigns, as in said grant provided, which was confirmed as a private land claim, No. ——, by Act of Congress, entitled, "An Act to confirm certain Private Land Claims in the Territory of New Mexico," approved the 21st day of June, 1860. 1 L. D., 287.

In Bissell *vs.* Penrose, 8 How., 317, it was held that under the Act of Congress of 1836 an assignee of a claim could obtain confirmation of a title in his own name.

The petition of the assignee must, however, be presented to the tribunal authorized and designated by Congress to investigate said claims, and required to report upon the validity or invalidity, and who has the authority to recommend a confirmation or rejection of the same. The petitioner must show his derivative title from the original grantee. Not only that, but he must show that he owns the whole of the grant. If the grant is to be divided among a thousand persons, or any number, the confirmation and the patent should be in the name of the original grantee, (U. S. *vs.* Grimes, 2 Black., 610.)

Where the claimant presents the original title as well as his evidence of derivative title before the tribunal charged with the duty of investigating and reporting upon the validity or invalidity of said claim, it is held that the said tribunal decides upon both the original and the derivative title, and that the confirmation operates as a grant to the actual claimant or owner, although his name was omitted in the form of the confirmation. (Bissell *vs.* Penrose, 8th How., 317; Strother *vs.* Lucas, 6 Pet., 772; Carpenter *vs.* Rannells, 19 Wall., 138; Connoyer *vs.* Schaeffer, 22 Wall., 261.)

The petition to the Surveyor-General, September 11, 1855, for the confirmation of the grant to Maese and his associates, was made by Francisco Lopez, Henry Connelly, and Hilario Gonzales, for themselves and all other claimants and legal owners of said grant. Since no derivative titles were filed with the Surveyor-General by anyone to be passed upon by him, with the titles of the original grantees, then the confirmation was to none other than Maese and others, the original grantees. Neither did Congress have the name of any person or persons who had complete titles to the Las Vegas grant to be confirmed, except those of Maese and his associates.

2. *Established Precedent.* The action of the Commissioner of the General Land Office with reference to patents to the claims confirmed by the Act of June 21, 1860, has been uniform in terms and strictly conformed to the formula adopted by said office, and which had been used for a number of years.

In claim No. 1, confirmed in the first section of said act, Preston Beck was recognized as the confirmee to said claim by showing his derivative title to the Surveyor-General, from Juan Estaban Pino, the original grantee. Stoneroad *vs.* Stoneroad, 158 U. S., 240.

No. 4, Charles Beaubien, the assignee of Lee and Beaubien, original grantees, was recognized as the confirmee in said act of said claim. Tameling *vs.* U. S. Freehold Co., 93 U. S., 644.

No. 8 of said act, designated by the Surveyor-General in his report to Congress as the "Town of Los Trigos," the Secretary of the Interior ordered the Commissioner of the General Land Office to issue patent to the three original grantees, as shown by the report of the Surveyor-General to Congress, and that the patent should issue thereon in accordance with the provision of Section 2, Act March 3, 1869. (15 Stats., 342.) 14 L. D., 355.

No. 15, patent was issued by the Commissioner of the General Land Office, May 19, 1879, to Beaubien and Miranda, the original grantees, "their heirs and assigns." At the date of the issuance of said patent the title to the tract of land confirmed as claim No. 15, was in the Maxwell Land Grant Company. U. S *vs.* Maxwell Land Grant Co., 121 U. S., 625. Russel *vs.* Maxwell Land Grant Co., 158 U. S., 254. Interstate Land Co. *vs.* Maxwell Land Grant Co., 139 U. S. 569.

No. 25, confirmed by said act, designated by the Surveyor-General in his abstract as the "Town of Cañon de San Diego," patent was issued by the Commissioner of the General Land Office October 1st, 1881, to "Francisco Garcia and nineteen others named therein, the original grantees, and those claiming under or through them." 1 L. D., 287; Chavez *vs.* U. S., 168. U. S., p. 179. It will be observed that this patent was issued to the original grantees 84 years after the grant had been made by the Spanish Government.

No. 29, confirmed by said act and designated by the Surveyor-General in his abstract to Congress as claim of the "Town of Anton Chico," patent was issued by the

Commissioner of the General Land Office under the instruction of the Secretary of the Interior, February 9, 1883, "to Manuel Rivera and others, being the 36 men to whom the grant was made by Fecunda Melgares, May 2, 1822, their representatives and assigns." (1 L. D., 287–8.) It will be observed that this patent was made to the original grantees 61 years after the grant was made by the Spanish Government.

No. 32, confirmed by said act and designated by the Surveyor-General in his abstract and report, as the claim of the "Town of Mora" patent was issued by the Commissioner of the General Land Office, August 15, 1876, to the 76 persons to whom juridical possession was given in 1835, their heirs and assigns, as shown by the list accompanying the report of the Surveyor-General to Congress. It will be observed that the patent to this grant was issued 41 years after the grant was made.

No. 38, confirmed by said act and designated by the Surveyor-General in his report to Congress as the claim of "Ramon Vigil *et al.*," patent was issued by the Commissioner of the General Land Office, under instruction of the Secretary of the Interior, April 10, 1883, to "Pedro Sanchez, original grantee, his heirs, representatives and assigns," I. L. D. 288. This patent was issued for said claim 141 years after the grant was made by the Spanish government to Pedro Sanchez.

From the foregoing it will be seen that the Commissioner of the General Land Office, in issuing patents for the several land claims confirmed by the Act of June 21, 1860, adhered strictly to the formula adopted by said department years prior to the issuance of the same. In not a single case has he sought to issue patents to other than the original grantees, their heirs and assigns, except in the case at bar. Where parties had shown and filed

with the Surveyor-General, at the time of his investigation of the grant, a compiete and perfect derivative title from the original grantees, and such fact being reported by said Surveyor-General to Congress before the passage of the confirmatory act, then to the assignee.

VII.
To Whom Should Patent Issue.

How is the Commissioner of the General Land Office to ascertain the names of the persons to be inserted in the patent to the tract of land in issue? Simply by reading the act of confirmation and thereby ascertain that Congress June 21, 1860, confirmed private land claim "No. 20," as reported for confirmation by the Surveyor-General of New Mexico, communicated to Congress by the Secretary of the Interior in his letter dated February 3, 1860." Then by reading the report of the Surveyor-General and ascertain the *names* of the person or persons *whose title* is reported by said officer to Congress to be good and valid, and should be confirmed to the tract of land to which the grant had been made by the Mexican Government. And, furthermore, to ascertain from said report whether or not the Surveyor-General had reported to Congress that the original grantees had transferred their title to the whole of said grant to third parties, and if so, the name or names of those parties.

This Court, having under consideration private land claim "No. 15," confirmed by Section 1 of the Act of June 21, 1860. U. S. *vs.* Maxwell Land Grant Co., 121 U. S., 325, says:

> "In the present case the Surveyor-General had before him, not only the original grant of Armijo to Beaubien and Miranda, but he had the record of the juridical possession delivered to the grantees,

according to the laws of Mexico on that subject, made by the justice of the peace, Cornelio Vigil, accompanied by a map or Diseño, laying down with at least attempted particularity and precision the complete boundaries of this tract of land. So that the Surveyor-General, not only had the authority to determine the extent of the grant, as well as its validity, but he had the means of ascertaining it. * * *

The case before us is much stronger than the ordinary case of an attempt to set aside a patent, or even the judgment of a court, because it demands of us that we shall disregard or annul the deliberate action of the Congress of the United States. The Constitution declares (Article IV, Sec. 1), that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." At the time that Congress passed upon the grant to Beaubien and Miranda, whatever interest there was in the land claimed which was not legally or equitably their property was the property of the United States; and Congress having the power to dispose of that property, and having, as we understand it, confirmed this grant, and thereby made such disposition of it, it is not easily to be perceived how the courts of the United States can set aside this action of Congress. *Certainly, the power of the courts can go no further than to make a construction of what Congress intended to do by the act, which we have already considered, confirming this grant and others.*"

How did the Department or this Court ascertain who were the grantees and confirmees of private land claim No. 15? It was by reference to the reports of the Surveyor-General and the grant reported by him to Congress for confirmation, and showing the names of the persons to whom Congress confirmed said grant No. 15. Notwithstanding the fact that the title to the tract of land

confirmed as claim No. 15 was in the Maxwell Land Grant Co. May 19, 1879, the date of the issuance of the patent by the Land Department, the patent was issued to "Beaubien and Miranda, their heirs and assigns," which under the law inured to the benefit of the Maxwell Land Grant Company, the assignee.

This Court, in considering the said Act (June 21, 1860) with reference to private land claim "No. 4," confirmed by Section 1 of said Act, Tameling *vs.* U. S. Freehold Co., 93. U. S., 644, said:

> The Surveyor-General of New Mexico is clothed with large power, and required to decide upon the validity of each claim. Final action on the subject is reserved to Congress. Such action is, of course, conclusive, and, therefore, not subject to review in this or any other forum.
>
> It is obviously not the duty of this court to sit in judgment upon either the recital of matters of fact by the Surveyor-General, or his decision declaring the validity of the grant. They are embodied in his report, which was laid before Congress for its consideration and action. We need only say that the facts are distinctly set forth that Luis Lee and Narciso Beaubien, September 27, 1843, petitioned the then Civil and Military Governor of New Mexico "For a grant of land in what is now the County of Taos, embracing the Costilla, Culebra and Trienchera Rivers, including the *Rito*, of the Indians, and Sangre de Cristo to its junction with the Del Norte River;" that the petition was referred by the Governor, to the prefect, with instructions to give the possession asked for by the petitioners; that they were put in possession with the boundaries contained in the petition, "vesting in them, their children and successors, a title in fee to said lands." After setting forth that, by the death of one of the parties, Charles Beaubien, as his heir at law inherited the undi-

vided half of the land, and that he acquired the remainder from the administrator of the other grantee, the conclusion is reached, that the grant is a good and valid one and that a legal title vests in Charles Beaubien to the land embraced within the limits contained in the petition. The grant was approved and recommended for confiirmation by Congress.

Congress acted upon the claim as recommended for confirmation by the Surveyor-General. The confirmation being absolute and unconditional without any limitation as to quantity, we must regard it as effectual and operative for the entire tract.

The phraseology of the confirmatory act is, in our opinion, explicit and unequivocal."

The Commissioner of the General Land Office, in order to ascertain the names of the grantees and confirmees of private land claim No. 20, in his preparation of patent therefor, can easily ascertain that fact by following the concise statement of fact made by the learned Justice in the foregoing decisions.

If this Court cannot "sit in judgment upon either the recital of matters of fact by the Surveyor-General, or his decisions declaring the validity of the grant," where does the Secretary of the Interior or the Commissioner of the Land Office get such power? The Surveyor-General reports to Congress as a fact that the title to Maese and his associates to the tract of land in controversy is "a good and valid title," and that said tract of land "is lawfully separated from the public domain and entirely beyond the disposal of the General Government."

We submit that the recital of facts reported by the Surveyor-General to Congress for its action, which are proper to be referred to by the Commissioner of the General Land Office to ascertain the names of the grantees

and confirmees to private land claim No. 20, are as follows:

> That on the 20th day of March, 1835, Juan de Dios Maese, Miguel Archuleta, Manuel Duran and José Antonio Casaos, for themselves and in the name of 25 others, petitioned the corporation of El Bado for a tract of land for cultivation and pasture, situated in the County of El Bado and bounded as follows: On the north by the Sapello River, on the south by the boundary of the grant of Don Antonio Ortiz, and on the east by the Aguage de la Llegua, and on the west by the boundary of the town of El Bado.
>
> On the same day the corporation of El Bado transmitted the petition to the territorial deputation, with the recommendation that the petition be granted.
>
> On the 23rd of March of the same year the grant was made by the territorial deputation, with the boundaries asked for.
>
> On the 24th of the same month and year, Francisco Sarracino, the acting governor or political chief, directed the constitutional justice of El Bado to place the parties in possession, which was done on the 6th day of April, of the same year.
>
> The grant made to Juan de Dios Maese and others is not contested on the ground of any want of formality in the proceedings, but as far as the documentary evidence shows, is made in strict conformity with the laws and usages of the country at the time.
>
> It is firmly believed that the land embraced in either of the two grants (Baca and Maese *et al.*) is lawfully separated from the public domain and entirely beyond the disposal of the General Government, and that in the absence of the one the other would be a good and valid grant.

Although the Surveyor-General had reported that Baca heirs had contested the title of Maese and his associates

before him, yet the Commissioner of the General Land Office is fully apprised of the fact that Baca heirs have, since the making of said report, relinquished whatever title they had to the settlers on said tract of land under the grant made to Maese *et al.*, and in lieu of their interest his office had permitted the Baca heirs to locate 496,446.92 acres of out of the public domain, as provided by Section 6 of the Act of June 21, 1860. All of these facts being within the full knowledge of the Land Department, the Baca heirs would not be considered in the issuance of the patent. No other party would or could be considered as having a legal title and to whom patent should issue but Maese and his associates, their heirs, representatives and assigns.

VIII.

Result of Appellants and Appellees Contention.

It is alleged by appellants as a fact that Juan de Dios Maese and his associates, to whom the grant was made in 1835, are all dead; that they died seized and possessed of the lands known as the Las Vegas grant, except possibly some of the grantees had conveyed to others their interest in whole or in part to said grant.

It is further alleged as a fact that appellants are the heirs, representatives and assigns of said Maese and his associates, and that their titles to said grant are mediate or immediate, and that as such they hold their titles and peaceable possession of said tract of land. The demurrer of defendants admits this statement of facts. The records of the Land Department also show the latter state of facts.

The Secretary of the Interior, in his opinion of December 5, 1891, (13 L. D., 655,) recites that the Las Vegas grant, as originally surveyed, and the plat thereof ap-

proved by the Surveyor-General, December 8, 1860, contained an area of 496,446.96 acres, but that Mr. Julian, the then Surveyor-General of New Mexico, expressed the opinion that said grant should not legitimately embrace more than 20,000 acres, which estimate was subsequently reduced to 6,000 acres. The Secretary held that the extent of the Las Vegas grant should be made to include simply the allotments assigned to settlers under the original concession to Maese and his associates, and that—

> "A resurvey should be made so as to include only the lands which had been allotted or assigned to settlers under the terms of the original concession at the time the Territory of New Mexico became subject to the laws of the United States; and a patent for said lands should be issued on said survey to the town of Las Vegas, so that the proper parties in interest could perfect their titles to these lands. The public surveys should be extended over the residue of said lands, and the same thrown open under the general laws."

In accordance with said opinion, the Secretary of the Interior, February 12, 1894, instructed the Commissioner of the General Land Office to order the Surveyor-General of New Mexico to have said grant measured, and suggested the employment of one R. B. Rice to make the final survey. (Rept. Com. G. L. O., 1894, p. 273.) April 27, 1894, (Ib. 276) Mr. Rice was employed and instructed:

> "You will endeavor to determine the actual number of allotments made by the Constitutional Alcalda under the provisions of said grant at the time the Territory of New Mexico became subject to the laws of the United States; and you will also endeavor to determine the true limits or boundaries of said allotments, as the same appear

> and are set out in the hijuelas (title papers) issued to the settlers by the Alcalda making the distribution."

Deputy Surveyor Rice, April 30, 1895, in reply to a letter from the Commissioner, dated April 10, 1895, with reference to the propriety of said deputy demanding a chain of title from the present claimants back to the original grantees, says:

> "I am aware that it would be unreasonable to require everybody to get a chain of title from themselves back to the original allottees, and I have not been asking everybody to make the attempt. From what I can see and have learned about the matter, I am satisfied that the greatest objections are raised by those who can, but do not want to, show the original titles. I know that some of the old papers are honestly gone, and in such cases the present claimants cannot comply with a request to show the original." (Report Comr. of L. O., 1895, p, 253.)

In his reports, however, he designates a number of hijuelas (title papers) of assignments from the original grantees, on record in the County of San Miguel, which he had investigated. In not a single instance does he report a title from the town of Las Vegas, and neither was he instructed by the Land Department to require the production of a title from said town by any claimant of the land or any portion of the same.

It is proper here to state that on February 15, 1895, Jefferson Raynolds, for himself and the other inhabitants of the town of Las Vegas and the territory contained in the land grant, instituted a suit in the Supreme Court of the District of Columbia, seeking to enjoin the then Secretary of the Interior and Commissioner of the General

Land Office from prosecuting said resurvey under the decision of the Secretary of the Interior. (13 L. D., 646.) Injunction was granted by said court and affirmed by the Court of Appeals. (9 App. D. C., 261.) October 10, 1895, the Department ordered a discontinuance of said proposed resurvey. (Rept. Comr. L. O., 1896, p. 416.)

A patent as requested and sought by appellants, to wit: In the name of the original grantees, their heirs, representatives and assigns will inure and protect every interest equitable and consummate of all persons having an interest in and to said grant of land. The town of Las Vegas or any other town, corporation or individuals, having a title to any portion of said land, which will be recognized by any of the courts of the land, would be fully and amply secured and protected under said patent, and which will inure to the benefit of all such persons whose title would be respected by the Court. (Rev. Stats., 2448.)

We submit, that the grant having been made 66 years ago, that the natural presumption would be that during the 66 years a large number of transfers by devise as well as other characters of conveyance would have been executed by the original grantees, their heirs, and assigns, and that it would be against public policy, if for no other reason, to now disturb the titles of said land and parts thereof. That a patent now to issue in the name of the so-called town of Las Vegas would be to disturb and cast a cloud over the titles of every home or parcel of land upon said grant, and as such patent would take date of and relate back to September 11, 1855, the date when Connelly, Lopez and Gonzales filed their petition before the Surveyor-General of New Mexico, it would be to disturb all transfers and conveyances of every character whatever, made by and through the original grantees.

Mr. Justice Shiras, in the course of his opinion in the case of U. S. *vs.* Chaves, 159 U. S., 452, uses the following language:

> "Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is a general rule of American law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for 30 years, and that said rule will be applied as a *presumptio juris et de jure* wherever by possibility a right may be aquired in any manner known to the law."

The records in this case show that the original grantees, their representatives and assigns, the appellants, have held exclusive and uninterrupted possession of the tract of land in controversy, from 1835, to the present, a period of 66 years, under the grant made by the Mexican Government, and with the boundaries as shown by the approved survey and plat made by the Surveyor-General, December 8, 1860.

H. C. BURNETT,
FRED BEALL,
Appellants' Solicitors.

Supreme Court of the United States

PABLO [illegible]

BINGER [illegible]

REPLY BRIEF FOR THE APPE[illegible]

In the Supreme Court of the United States,

OCTOBER TERM, 1901.

NO. 226.

PABLO MAESE, JOSE L. LOPEZ, DIONICIO GONZALES, AND JESUS MARIA TAFOYA, Appellants.

vs.

BINGER HERMANN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE UNITED STATES, AND ETHAN ALLEN HITCHCOCK, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

REPLY BRIEF FOR THE APPELLANTS.

Counsel for the appellees presents his arguments under four separate heads, making four sub-divisions of his fourth general proposition, as follows:

1. Complainants not entitled to equitable relief.
2. The Supreme Court of the District of Columbia was without jurisdiction.
3. There is a fatal defect of parties.
4. Apart from the matters before discussed, complainant's case is without merit.

Sub-divisions of the fourth proposition.

A. The court will not accept complainant's statement of the effect of the act of June 21, 1860.

B. A consideraion of the act of June 21, 1860, and of other matters of which the court takes judicial notice, shows that the claim in question was confined to the town of Las Vegas.

C. That the town of Las Vegas is the confirmee designated by Congress is believed to be clearly shown in the following departmental decisions relating to this claim.

4. Confirmatory patent must follow act of confirmation. Neither Land Department nor courts can revise action of Congress.

REPLY.

To a very large extent each and every of the above propositions has been anticipated in our brief now on file, but we will supplement that by a brief reply to the argument of appellee's counsel taking his propositions up in their order.

I.

COMPLAINANTS NOT ENTITLED TO EQUITABLE RELIEF.

In support of this proposition counsel for appellees says: They have failed to make it appear that the action which they seek to prevent will work any serious harm to them or any injury for which an adequate remedy cannot be obtained in a court of law. They do not present a condition which entitles them to the writ of injunction.

That statement is followed by quoting section 2447 of the Revised Statutes and section 4 of the act of June 21, 1860, and then it is asserted that "it is immaterial whether the patent in this case is isued under section 2447, Revised Statutes, or under the act of March 3, 1869. The character of the duties to be performed and the effect of the patent to be issued are the same. In neither case would any valid adverse right of

any person be affected. And such right could be asserted before any proper tribunal just as effectually as if such patent had not been isued."

This court discussing the act of June 21, 1860, in the case of Shaw *vs.* Kellogg, said: "There was not at the time of these transactions and has not since been any statute specifically authorizing a patent for this land" (meaning that selected by Baca heirs in lieu of the Las Vegas grant). "Section 2447, Rev. Stat." (taken from the acts of 1854, 10 Stat. At. L. 599, chap. 10), applies only to the case of a claim to land "which has heretofore been confirmed by law."

The Los Trigos grant was confined by the act of June 21, 1860, and the Secretary of the Interior on April 6, 1892, ordered that patent be "issued in accordance with the provisions of section 4, act of March 3, 1869 (14 Stat. 342)" 14 L. D. 355-358.

In support of our position that the patent in this case must be issued under the act of March 3, 1869, we beg to submit the following extract from the report of the House Committee on the bill which became the act of March 3, 1869:

> Public policy, as well as justice to the individual, alike require that the rights of property should be settled and known; that titles to real estate, especially, should be clear and perfect, and where possible all clouds or defects be removed.
>
> Accompanying this report is a bill, the passage of which we recommend which provides for such confirmation, not by granting to the claimants a fee-simple estate in those lands, but simply by way of quit-claiming on the part of the United States to the *heirs of the original grantees.* That is all that in the opinion of your committee, is required under our treaty with Mexico, and all that is necessary to make a perfect title in the absence of any adverse claims; and should there be any such adverse claims the parties are left, under the proposed legislative action, to seek their remedies in the proper judicial tribunals of the country.
>
> The bill herewith reported also provides for the issuing of a patent in each case. It is not assumed that a patent is at

all necessary in order to confer or confirm title in these cases, for we are aware that our Supreme Court has decided that confirmation by act of Congress, and approved survey under it, are sufficient evidence of title without any patent; but we believe it due to these claimants, whose original title papers have heretofore been surrendered to our government, that they should not be put to the trouble of providing, each for himself or herself, a copy of the treaty of Guadalupe Hidalgo, of the act of Congress of July, 1854, of the act of Congress confirming such title and the survey under it, in order to feel assured that the lands which in some of these cases have been in the possession of these claimants or their ancestors for 100 years, is really their property. As American citizens they are entitled to a simpler evidence of title, and such as is given to our citizens who acquire real estate from the Government by the various modes provided by our laws.

In some of the acts heretofore passed, in reference to lands under said treaty with Mexico, patents have been required to be issued, while in others this has been overlooked; hence we provide furthermore in this bill that in all cases in which confirmation has been had, without the issuing of any patent, such patents shall be issued, thus placing all claims under said treaty upon an equal basis.

Reports of Committees on Private Land Claims.
Mis. Doc. 81, Part 3, 1879.

The office of a patent to a confirmed land grant serves as documentary evidence of a complete and perfect title. The act of confirmation recognizes the validity of the claim, and operates to transfer to the confirmees all estate or interest in the lands which the United States as the sovereign power could have. A patent issued upon the confirmation of a claim of a previously existing title is documentary evidence, having the dignity of a record of the existence of that title.

The patent is of great value to the confirmees, as it enables them without other proof to maintain their title in the tribunals of the country, and being founded on a survey by the government, it removes all doubt as to the boundaries of the tract, and in this way proves an instrument of quiet and

security, but it does not add anything whatever to the title or interest vested by the act of confirmation.

Langdeau *vs.* Hanes, 21 Wall. 521.

Wright *vs.* Roseberry, 121 U. S. 488.

Monroe *vs.* Whitney, 95 U. S. 551.

Same case in 112 U. S. 963.

Ryan *vs.* Carter, 93 U. S. 78.

Same case in 112 U. S. 963 (Book 28, 871).

Ryan vs. Carter, 93 U. S. 78 (Book 23, 807).

The case of Tubbs *vs.* Wilhoit, 138 U. S. 134, was an action for the possession of a tract of land in California. Tubbs asserted title to the land under a patent of the United States issued to him in October, 1879, upon a homestead entry made by him in May, 1873.

Kile, through whom Wilhoit claimed, derived his title through a patent from the state of California, the land having been certified to the state as swamp and overflowed lands, under the act of Congress of September 28, 1850, which act granted to the several states of the Union all the swamp and overflowed lands within their limits, which on the passage of the act remained unsold, and made it the duty of the Secretary of the Interior, as soon as practicable to make out an accurate list and plats of the land described, and transmit the same to the governors of the states and upon their request to cause patents to be issued to the states therefor.

July 23, 1866, an act was passed entitled "An act to quiet land titles in California," by which among other things the provisions of the original act of 1850 for the identification of swamp and overflowed lands in that state were changed. Their identification was no longer left to the Secretary of

the Interior, but was made subject to the joint action of the state and the federal authorities. The 4th section of that act provides as follows:

"That in all cases where township surveys have or shall hereafter be made under authority of the United States and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the state of California as swamp and overflowed all the lands represented as such, upon such approved plats, within one year from the passage of this act, and within one year from the return and approval of such township plats. It was held by the court:

1. That the swamp land act of 1850 imported a present grant to the states, and the title to the land passed to the states at once, their identification to be made by the Secretary of the Interior, but when identified the title to relate back to the date of the act.

2. By the act of 1866 the provisions of the act of 1850 for the identification of the swamp lands in California were changed, and where township plats were made and approved, it was made the duty of the Commissioner of the General Land Office to certify over to that state as swamp all the lands represented as such upon such approved plats.

The Commissioner of the General Land Office had refused to certify the lands as swamp and overflowed to the state of California, upon the idea that the plats and surveys of the swamp lands had not been approved, but the court held that the act of 1866 did not require approval by the commissioner of the General Land Office of the township plats which had been made and approved by the Surveyor General of the United States for California.

And then proceeded to say:

"Whether the township plat be considered as approved by the action of the Surveyor General or by the subsequent recognition of its correctness by the Commissioner of the General Land Office, when approved, the duty of the Com-

missioner to certify over to the state the lands represented thereon as swamp and overflow was purely ministerial. He could not defeat the title of the state by withholding such certificate, nor could he add to the title by giving it. Its only effect would have been to facilitate the proof of the vesting of the title in the state by its additional recognition of the land as that covered by the Congressional grant of 1850. It would not have added to the completeness of the title. A strange thing it would be if the refusal of an officer of the Government to discharge a ministerial duty could defeat a title granted by an act of Congress, and enable him to transfer it to parties not within the contemplation of the government."

In the case of the Board of Liquidation of La. *vs.* McComb, 92 U. S. 531, Justice Bradley, speaking for the court, said:

It has been well settled that when a plain official duty requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other.

To the same effect is Noble *vs.* Union Logging Rd. Co., 147 U. S. 165.

A patent of this grant should serve as documentary evidence of the previously existing title of the grantees, and that the land has been surveyed, and the survey approved, thus removing all doubts of the boundaries of the tract, and if issued to the original grantees or their legal representatives, will inure to the benefit of all representatives of the grantees of the land by contract, such as assignees, as well as by operation of law.

Carpenter *vs.* Rannells, 19 U. S. 138.

But if the patent shall be issued to any other than the original grantees, or their legal representatives, for instance, the town of Las Vegas could not inure to the benefit of the original grantees, or their representatives, and in order to protect their interests they would be compelled to file a bill in equity to have the patentee declared a trustee for their benefit. It is conceded that the town of Las Vegas was not the original grantee, nor is there any pretense that there was any such town until after the grant was made. A patent to the town of Las Vegas would cast a cloud upon the title of the repretsentatives of the original grantees, and would deprive them of what the law declares to be an "instrument of quiet and security."

Langdeau *vs.* Hanes, *supra.*

We submit that the foregoing is a complete and full answer to appellees' first contention.

II.

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA WAS WITHOUT JURISDICTION.

Under this head the appellees say:

That the duties to be performed by the officers of the Land Department in connection with this grant involved the exercise of discretion and were, therefore, not merely and purely ministerial in character, is abundantly demonstrated by the facts. Two parties, the town of Las Vegas and Marcos Maese and others, as original grantees or their representatives, applied for patent. To ascertain the merits of the claims thus presented, required investigation extending not only to the confirmatory act, but to the report of the surveyor-general referred to in said act, and all the documents accompanying that report. * * *

Can it be said that these acts were merely ministerial?

We reply yes. We say that everything that the Commissioner of the General Land Office was required to do in

order to the issuing of the patent was purely a ministerial act, and we also say that it was his duty to examine the original title papers accompanying the report of the Surveyor General, and his report, and the confirmatory act, and to issue the patent accordingly. We concede also that the main questions involved in Stoddard *vs.* Chambers, 2 How. 284, and United States *vs.* Stone, 2 Wall. 525, were not the "controlling of the action of executive officers in the issuing of patents." But whether the act of issuing a patent was ministerial or judicial was involved in the solution of the questions under discussion in both of those cases. The court defined what a patent of a confirmed grant is, and in doing so, declared the character of the act in issuing it. The court said: "The patent is but evidence of a grant, and the officer who issues it acts ministerially and *not judicially.*"

Is it contended that that is not a correct statement of the law?

Justice Baldwin, in Grignon *vs.* Astor, 2 How. 319, in discussing the character of a patent issued upon a Spanish grant says: "The patent was only the act of its ministerial officers."

Chief Justice Waite, in his dissenting opinion in United States *vs.* Schurz, says:

> I agree that when the right to a patent has become complete, the execution and delivery are the ministerial acts of the officer charged with that duty.
>
> 102 U. S. 378.

"The patent is but evidence of a grant," and to issue it is the performance of a specific definite duty required by law. The language of the act of March 3, 1869, is that the Commissioner of the General Land Office *shall* issue patents for said land in said territory which have heretofore been confirmed by acts of Congress and surveyed and plats of such survey filed in his office, but for which no patents have heretofore been issued. This court has decided that in cases

like this "writs of mandamus and injunction are somewhat correlative to each other."

Chief Justice Marshall in his opinion in the celebrated case of Marbury *vs.* Madison, 1st Cranch 135, makes the following observations upon the nature of a writ of mandamus, he says:

Blackstone in the third volume of his Commentaries, page 110, defines a mandamus to be "A command issuing in the King's name from the court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the King's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice."

Lord Mansfield in 3d Burrow, 1266, in the case of The King *vs.* Baker etal., states with much precision and explicitness the cases in which this writ may be used.

Wherever there is a writ to execute an office, perform a service or exercise a franchise (more especially if it be a matter of public concern, or attended with profit) and a person is kept out of possession or dispossessed of such right, and has no other specific, legal remedy, this court ought to assist by mandamus, upon reasons of justice, and as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government. This writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. This writ if awarded would be directed to an officer of government, and its mandate to him would, be, to use the words of Blackstone, "to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined, or at least supposes to be consonant to right and justice.

If one of the heads of the departments commits any illegal act under color of his office, by which an individual

sustains an injury, it cannot be contended that his office alone exempts him from being sued in the ordinary mode of proceeding. How then can his office exempt him from this particular mode of deciding of the legality of his conduct if the case be such a case as would were any other individual the party complained of, authorize the process? Where an executive officer is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president could not lawfully forbid, and is, therefore, never presumed to have forbidden; as, for example, to record a commission or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right to be done to the injured individual than if the same services were to be performed by the person not the head of a department.

If the law directs the head of a department to perform an act in regard to which no discretion is committed to him, and which upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires in some degree a construction of its language by the officer.

Roberts *vs.* Valentine, 176 U. S. 222.

A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple distinct duty, arising under conditions admitted or proved to exist, and imposed by law.

Mississippi *vs.* Johnson, 4 Wall. 475.

The principles upon which the acts of the head of a department may be controlled by the courts, are well and

clearly set forth by this court in Butterworth *vs.* Hoe, 112 U. S. 50.

After discussing the facts the court, on page 66, proceeds to say:

Some question is made as to the remedy. We think, however, that mandamus will lie and that it was properly directed to the Commissioner of Patents. He had fully exercised his judgment and discretion when he decided that the relators were entitled to a patent. The duty to prepare it, to lay it before the Secretary for his signature and to countersign it, were all that remained, and they were all purely ministerial. These duties he had failed and refused to perform merely out of deference to the claim of the Secretary to reverse and set aside the decision on the merits in favor of the relators. This we have held not to be a valid excuse.

A mandamus may issue from this court to compel the execution of a judgment according to its mandate to a lower court. In Perkins *vs.* Fourniquet, 14 Howard 328, this court affirmed a decree rendered by the circut court for the Southern district of Mississippi, and the mandate was sent down accordingly. Process issued from the lower court and the marshal collected what he calculated was due on the affirmed decree, the defendant insisted that the mandate of this court had been misconstrued, and made a motion in the circuit court asking that court in effect to construe the mandate. The court denied the motion, and thereupon the defendant brought the case back to this court by appeal, the object of which was practically to obtain a construction of the mandate. Objection was made in this court that an appeal did not lie; the court said: "This objection to the form of proceeding involves nothing more than a question of practice. The mandate from this court left nothing to the judgment and discretion of the circuit court, but directed it to carry into execution the decree of this court, which was recited in the mandate. And if the decree of this court has been misunderstood or misconstrued by the court below to

the injury of either party we see no valid objection to an appeal to this court in order to have the error corrected. The question is merely as to the form of proceeding which this court should adopt to inforce the execution of its own mandate in the court below. The subject might, without doubt, be brought before us upon motion and a mandamus issue to compel its execution."

To the same effect is The City National Bank *vs.* Hunter, 152 United States, 512.

This court said in the case of The Board of County Commissioners of Labette County, Kansas, *vs* United States, 112 U. S. 217, that the court had jurisdiction to issue the *mandamus* to persons, who are not parties to its judgment against a township, but who are officers of the county and are under a legal duty to take those steps which the law has prescribed as the only mode of providing the means of paying the judgment and that a single writ is all that is necessary to enforce the assessment and the collection of a tax, and that there may be joined in it all those whose co-operation is required by law, even although it be by separate and successive steps in the performance of these official duties which is necessary to secure that end.

The reports of this court, and nearly all the State courts, are replete with similar adjudications.

The rule is laid down in Dunlap *vs.* Black, 128 U. S. 40, that when by special statute or otherwise a ministerial duty is imposed upon an executive officer, which he is bound to perform, without further question, if he refuses, a mandamus may be issued to compel him. But says learned counsel for the appellees: "Two parties, the town of Las Vegas and Marcos Maese and others as original grantees or their representatives applied for patent."

"To ascertain the merits of the claims thus presented required investigation, extending not only to the confirmatory act, but to the report of the Surveyor General referred to in said act, and all the documents accompanying that report.

Can it be said that these acts were merely ministerial?"

Did not the Board of Liquidation of Louisiana have to read and in a sense construe the Funding Act of the legislature of Louisiana, and other of the revenue laws, besides certain provisions of the Constitution of 1870? Did not the tax assessor, the tax collector, and the county commissioners have to look at the tax laws of Kansas, in order to obey the writ of mandamus issued against them? But the writ only compelled them to do what the law without the writ required them to do.

And were there not two persons contending with each other before the Patent Office in the case of Butterworth *vs.* Hoe? In that case Scott was contending with Hoe, and a bitter contest it was, too. Butterworth had to read the law, and from it learn his duty, and then perform it. When he failed to do it the court compelled him to prepare the patent, and submit it to the secretary for his signature.

Were there not two parties contending with each other in Perkins *vs.* Fourniquet? One put one construction on the mandate of this court, the other put a very different construction on it. The question was referred to the United States circuit court for the Southern district of Mississippi, and he construed it, acting judicially, but construed it wrong. This court said the whole question could have been settled by a mandamus from this court. Why? Because the mandate required the performance of a certain, definite, specific act, which was purely ministerial and allowed no discretion to the officers of the circuit court.

Did not Roberts, the U. S. Treasurer, have to examine the act of Congress of 1894, in order to determine whether or not Mrs. Valentine was entitled to the interest she demanded? This court said in reference to the duty of the Treasurer in that case that "There is but one act of Congress to be examined, and it is specially directed to the Treasurer. We think its construction quite plain and unmisakable. It directs the Treasurer to pay the interest on the certificates

which had been redeemed by him, and the only question for him to determine was whether these certificates had been redeemed *within the meaning of the act.*"

But he had to inquire and determine that certain certificates had been paid by him, and if so had they been paid within the meaning of that act, and therefore in a sense had to construe the act of 1894, and yet he was compelled to do the precise thing which that act required him to perform, and in that he had no discretion. So in this case, the Commissioner of the General Land Office must do the specific act required of him by the act of March 3, 1869, namely, issue a patent to the parties entitled thereto, pursuant to the act of June 21, 1860.

III.

THERE IS A FATAL DEFECT OF PARTIES.

The reply to this proposition is simple. The appellants' whole case is based on the theory that the issuing of the patent is purely a ministerial act, and to be such there can be no discretion in the Commissioner of the General Land Office as to whom it shall be issued. The act required of him is a certain, specific, definite one, and unless it is, the appellants have no standing in court.

The law fixes the character of the act to be performed, and of course, the character or nature of the act can not be changed by the views of the officer whose duty it is to perform it, nor by anything that can be done by others. Roberts, the Treasurer, asserted his right of discretion, and decided against Mrs. Valentine, but the court said the law took away from him all discretion, and imposed on him a purely ministerial duty.

There can be no contending adverse beneficiaries of a purely ministerial act, otherwise it would not be ministerial.

IV.

APART FROM THE MATTERS BEFORE DISCUSSED, COMPLAINANTS' CASE IS WITHOUT MERIT.

To sub-division A under the above heading, we do not deem it necessary to make any reply, but will proceed to reply to propositions B and C, which are in effect that the claim "was confirmed to the town of Las Vegas."

In this particular contention the appellees plant themselves on the confirmatory act, and seemingly refuse to look behind it, and herein probably lies their error. They should look at the entire record, and see what it was that Congress confirmed.

Everything subsequent to the grant relates back thereto, and must be interpreted in reference thereto.

In Landes *vs* Brant, 10 How. 384, the court in discussing the effect of the act confirming a Spanish land grant to Clamorgan, said:

In the case of Landes *vs.* Perkins, the Supreme Court of Missouri held that the conclusive legal title vested in Clamorgan by the confirmation of 1811; and that, being the date of the legal title, a court of law could not go behind it; nor did the confirmation, or patent, relate to any previous step taken to acquire title; and the Sheriff's deed, being a mere quit claim, did not estop Clamorgan or his devisees from setting up the legal title against such a deed. And it is intimated that a court of equity could be resorted to, and through its aid the sheriff's sale might be set up by decree.

How far a court of equity would interfere in such a case we are not disposed to inquire, as it is apprehended that the Supreme Court of Missouri was mistaken in the effect it attributed to the confirmation of 1811, and the patent founded on it. Clamorgan's petition asking a confirmation (under the act of 1805) was filed with his title papers with the recorder, and they were recorded (December 10, 1805).

The imperfect title as then filed was subject to seizure and sale by execution: the ultimate perfect title demanded and

granted was a confirmation and sanction by the political power of the imperfect title, and gave it complete legal validity; and to protect purchasers, the rule applies, "that where there are divers acts concurrent to make a conveyance estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation"—as stated in Viner"s Abr., tit. Relation, 290. The doctrine of relation is well illustrated in Jackson *vs.* McMichael, by the Supreme Court of New York, 3 Cowen 75, and recognized by the Supreme Court of Missouri in the case of Crowley *vs.* Wallace, 12 Missouri R. 145.

Cruise on Real Property (Vol. V, pp. 510, 511) lays down the doctrine with great distinctness. He says: "There is no rule better founded in law, reason, and convenience, than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation."

For the purposes of this case (without proposing to apply the rule to every other), we may assume that the first act April 21, 1806, and again by the act of March 3, 1807. As already stated, by the fourth section of this last act, the decision of the Board of Commissioners appointed to investigate such claims is made final against the United States, and he was entitled to a patent. His claim was fully within the provisions of the acts of 1805 and 1807.

Applying the doctrine of relation, and taking all the several parts and ceremonies necessary to complete the title together, "as one act," then the confirmation of 1811 and the patent of 1845, must be taken to relate to the first act—that of filing the claim in 1805.

of Clamorgan was that of filing his title papers and claim with the recorder of land titles, according to the fourth section of the act of March 2, 1805; this was regularly done, and the papers recorded. He claimed under the second section of the act of 1805, which was amended by the act of

In Bissell *vs.* Penrose, 8 Howard 317, the court said:

It has been argued, that the act of 1836 confirms only the Spanish concession in the abstract, without regard to the plat of survey or claimant, if an assignee of the grant. The

act provides, that the decisions in favor of land claimants made by the recorder and the commissioners, under the act of 1832, and the supplemental act of 1833, as entered in the transcript of decisions transmitted by the commissioner to the Commissioner of the Land Office, and by him laid before Congress, be, and the same are hereby confirmed.

Now the transcript of these decisions embraced, as required by the act of 1832, the date and quantity of each claim, and the evidence upon which each depended, together with the authority under which it was granted. The claimant was the party who had filed the claim in the office of the recorder, and had prosecuted it before the Board of Commissioners. His name, of course, appeared—Rudolph Tillier—in the case before us. He represented the interest of one of the sons of Benito Vasquez, in quantity eight hundred arpents. There were four other sons, each of whom was entitled to the same quantity. Tillier procured the private survey of his share, and filed his separate claim for that amount, together with the conveyance from the original grantee, and, under these circumstances, it is insisted that, upon the true construction of the act, the confirmation was in favor of the son, and not of the assignee.

It is certainly difficult to perceive what right or claim the son had, either before the commissioners or Congress, to be confirmed. Having parted with all his interest, he had neither land, nor claim, nor was he a claimant; as that term is regarded as applicable to those only in whose name the claim was filed with the recorder, under the act of 1805. By that act, every person claiming lands, etc., by virtue of any incomplete grant, etc., shall deliver to the recorder a notice, etc., of the nature and extent of his claim; and, also, the grant, order or survey, deed, conveyance, or other written evidence of his claim, to be recorded; providing at the same time in the case of a complete grant, that the claimant need only record the original grant, together with the order of survey and plat; all other conveyances and deeds to be deposited with the recorder; thereby making a distinction between the two cases, as it respects the derivative title; and, in both, clearly contemplating that the assignee might be a claimant.

This is the view taken of the question in the case of Strother *vs.* Lucas, on each occasion when it was before this

court. (6 Peters, 772; 12 Ib. 458.) It was there held that the confirmation was to be deemed to be in favor of the person claiming it. The construction has entered into the usage and practice of the Land Office, as may be seen by the instructions from that office and the opinion of the Attorney General on the subject. (2 Land Laws, 747, 752, and 1043.)

See also Pollard Heirs *vs.* Kibbe, 14 Peters 353.

The appellees have referred to the report of Senate Committee on the bill which became the act of June 21, 1860, and to that the appellants have no objection, for it only goes to strengthen their position. We make the following extract from that report

The second report of the Surveyor General of said territory was communicated to the Senate by the Secretary of the Interior, by letter addressed to the Vice President, under date 3d of February, 1860, and consists of an abstract marked Exhibit A, comprehending nineteen claims, numbered from twenty to thirty-eight, both inclusive.

The bundles of papers containing the copies of the titles, the evidence, and the report of the Surveyor General on each claim separately, have been examined by the committee; and they concur fully in the reports of that officer, recommending the confirmation of all said claims, except that which is numbered twenty-six, in the name of Juan B. Vigil.

What do the committees say they had before them? The papers containing the copies of the TITLES, the *evidence* and the *report* of the Surveyor General on *each* CLAIM separately.

Are there copies of titles to any grant to the town of Las Vegas found in the record?

None at all.

Is there any *evidence* in the record showing that Mexico ever made a grant of land to the town of Las Vegas?

We have examined all the evidence sent up by the Surveyor General, as found in Ex. Doc. No. 14, and there is not a word of reference to the town of Las Vegas.

But did the committee examine the copies of TITLE and

the *evidence;* and, if so, what did the committee say about it?

Yes, they say: "The bundles of papers containing the copies of the *titles,* the *evidence* and the *report* of the Surveyor General on *each claim* separately have been *examined* by the committee, and they *concur* fully in the *reports* of that officer, recommending the *confirmation* of *all said claims,* except that which is numbered twenty-six in the name of Juan B. Vigil."

What was it the committee so fully concurred in?

It was the confirmation of *all said claims,* and, of course, that included the claim for the Las Vegas grant filed by Lopez, Connelly and Gonzales before the Surveyor General.

Lopez, Connelly and Gonzales allege in their petition to the Surveyor General that they and the citizens they represent are the *claimants* and legal owners of the tract. The Surveyor General certifies that the record contains a true copy of the original *claim* or petition. See Ex. Doc. 14, page 17.

In his report he says: The *claim* of Las Vegas is based on the following proceedings:

Ex. Doc., 14, page 44.

The petition of Lopez et al., states that "said grant is filed with this petition."

Ex. Doc. 14, page 16.

The Surveyor General in his report to Congress, after reciting that "the claim of Las Vegas is based on the following proceedings," and then setting out the petition of Juan de Dios Maese et al., on page 44, of Ex. Doc. 14, referring to the contest between the Baca heirs and the claimants under the grant to Juan de Dios Maese, says: "Conflicting *claims* between parties should be adjudicated before the proper tribunals of the country having jurisdiction in the premises.

"Under this view of the case, it will not be necessary to refer to any other points made by counsel than those touching the sufficiency of the *titles* given, and under which the respective parties *claim.*"

Is there or can there be any doubt to whom the Surveyor General referred when he thus spoke of "the respective parties" who made claim to this land? Had any parties asserted before him a *claim* to this land, except the Baca heirs and Lopez, Connelly and Gonzales, for themselves and the citnzens whom they represented?

There can be no doubt about this matter. The *claimants* are distinctly declared to be the Baca heirs, on one side, and Lopez et al., representing the original grantees under the grant of March 23, 1835, on the other, and it was their respective *claims* that he investigated, and adjudicated, and recommended to Congress for approval, and when the Senate Committe reported that "they *fully concur* in the *reports* of that officer, recommending the confirmation of all of said *claims*," they concurred in the conifirmation of the claim preferred by Lopez et al.

Section 3, of the conifirmatory act, is as follows:

"Sec. 3. And it be further enacted, that the private land *claims* in the territory of New Mexico, as recommended for confirmation by said Surveyor General in his reports and abstract, marked 'Exhibit A,' as communicated to Congress by the Secretary of the Interior in his letter dated the third of February, eigheen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be and the same are hereby confirmed, with the exception of the claim numbered twenty-six, in the name of Juan B. Vigil, which claim, numbered twenty-six is not confirmed."

What was it Congress confirmed?

The private land *claims*, as recommended for confirmation by the Surveyor General,

The claim filed by Lopez and others before the Surveyor General was based on and accompanied by the original title papers or grant, and that is the first of the concurrent acts to which the office should look in proceeding to issue the patent; the next is the report of the Surveyor general and the last is the confirmatory act, the last two relating back to the first, which is the controlling one.

Landes *vs.* Brant, *supra.*

D. Confirmatory patent must follow act of confirmation. Neither Land Department nor courts can revise action of Congress.

That is a correct statement of the law, and upon it appellants stand. The patent must follow the confirmatory act, and all that is included in the act. It is not supposed that any one will deny that included in the confirmatory act is the claim presented by Lopez and others, and the report of the Surveyor General thereon. They are as much a part of the act as if they had been actually written therein.

THE ESTABLISHER PRACTICE OF ISSUING PATENTS.

We will not attempt to cite all the numerous cases that have been passed upon by this court in which the patents were issued to the parties who presented the claims, but will refer to a few. We can find no exception to the general rule. The patents were thus issued in Grignon *vs.* Astor, 2 How. 319; Stoddard *vs.* Chambers, 2 How. 284; Landes *vs.* Brant, 10 How. 348; Easton *vs.* Salisbury, 21 How. 426; Morrison *vs.* Jackson, 92 U. S. 315; U. S. *vs.* Maxwell Land Grant, 121 U. S. 325; Tameling *vs.* U. S. Freehold, 93 U. S. 644; Chavez *vs.* United States, 168 U. S. 179; Bissell *vs.* Penrose, 8 How. 317; United States *vs.* Grimes, 2 Black. 610; Carpenter *vs.* Rannells, 19 Wall. 138; Connoyer *vs.* Schaeffer, 22 Wall. 261.

The Land Department has, as shown in our original brief, followed this long established practice in reference to all the private land claims confirmed by the act of June 21, 1860, except that of the Las Vegas claimants.

In the Anton Chico claim, the report of which is found on page 144 of Ex. Doc. 14, and which is one of the claims confirmed by the act of June 21, 1860, the Surveyor General's report is found on pp. 150 and 151, and is headed:

"Town of Anton Chico *vs.* The United States," and concludes thus:

The grant made by Melgares on the 2d of May, 1822, severed the land from the public domain and placed it beyond the further reach and control of the Government. The

instructions to this office provides that the *existence of a town* when the United States took possession of the country being proven, is to be taken as *prima facie evidence of a grant to said town*, and as it is proven to have been in existence in 1839, and up to 1846, with the knowledge and tacit consent of the Mexican Government, and *was recognized as a town by that Government*, it is believed to be a good and valid grant and the land claimed severed from the public domain. It is therefore approved and ordered to be transmitted to Congress for its action in the premises.

Note the wording of this approval; it much more strongly indicates an approval of the grant to the town than the language employed in the approval of the Las Vegas grant. There is no direct approval in *haec verba* to any one. "It is believed to be a good and valid grant, and the land claimed severed from the public domain. It is therefore approved," but to whom is not stated. The failure to state to whom it was approved caused the same character of litigation as in the case at bar, and was adjudicated by the Land Department February 19, 1883. See 1 L. D., 287, where it is said:

I have considered the matter of the land claim known as Anton Chico, Santa Fe district, New Mexico, on appeal, alleged to have been presented in behalf of the claimants under Manuel Rivera from your decision of August 10, 1881, holding that confirmation is to the "town of Anton Chico," and that patent should so run.

The record shows that the claim was presented to the United States Surveyor General of New Mexico, in accordance with the provisions of the eighth section of the act of Congress, approved July 22, 1854 (10 Stat., 309), and was finally reported by him to Congress, and thereby confirmed as No. 29 by the third section of the act of June 21, 1860. (12 Stat., 71.)

I am of the opinion that substantial justice would be done to all parties in interest by following the terms of the grant or judgment recorded, rather than by having regard to the mere style of the case or description of the papers therein, and that patent should issue accordingly, citing the grant as in terms following: "To Manuel Rivera and others, being the thirty-six men to whom the grant was made by Facunda Nulgares, Governor, May 2, 1822, their children, heirs, successors and assigns, as in said grant provided, and which

was confirmed as private land claim No. 29, by act of Congress, entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860, subject to all the provisions and conditions mentioned and set forth in the decree granting said tract of land as aforesaid, and the record of juridical possession and other documents accompanying the same, and made part of the report of William Pelham, Surveyor General of New Mexico, on the 15th of July, 1859, and to the rights of all persons claiming under said provisions and conditions.

Your decision is accordingly reversed."

When subsequent to that the claim of the town of Tecalote came before the Land Department for patent, it was insisted that the patent should be issued in that case, as was the patent in the Anton Chico case, but the department said "an examination of that case shows that said claim was confirmed as No. 29 by the third section of the act of Congress, approved June 21, 1860, which materially differs from the act confirming the Tecalote grant." (5 Land Decisions 61.) The Tecaloto grant was held to have been confirmed as a town grant, which it was, while that of Las Vegas was confirmed as a private land, or colonization grant.

The title of the act, confirming the Tecalote grant is as follows:

"An act to confirm the land claims of certain pueblos and towns in the Territory of New Mexico." (11 Stats. 374.)

The title of the act confirming the Las Vegas grant is as follows:

"An act to confirm certain private land claims in the Territory of New Mexico." (12 Stats. 71.)

The decision of the Secretary of the Interior in the Tecalote grant case shows that the department as late as April, 1892, the date of that decision, recognized the correctness of appellants' position in this case.

All that the appellants ask is that the Land Department be required to obey the law and to follow its directions in the Las Vegas case, as it has done in all other grants confirmed by the act of June 21, 1860.

Respectfully submitted,

H. C. BURNETT,
FRED BEALL,
Solicitors for Appellants.

26233

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

PABLO MAESE, JOSE L. LOPEZ, Dionicio Gonzales, and Jesus Maria Tafoya, appellants,
v.
BINGER HERMANN, COMMISSIONER of the General Land Office, and Ethan A. Hitchcock, Secretary of the Interior.
} No. 226.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEES.

STATEMENT.

The present suit was brought in the supreme court of the District of Columbia, by Pablo Maese et al., to restrain the Secretary of the Interior and the Commissioner of the General Land Office from issuing a patent for certain lands to the town of Las Vegas or to any other than the heirs and assigns of the original petitioners for a grant of said lands, and to compel the issuance of a patent therefor to the heirs, legal representatives and assigns of such petitioners (Record, pp. 1–7). The lands are in the Territory of New Mexico and embrace 496,446.96 acres.

To the bill the defendants filed a demurrer upon three grounds (Record, pp. 8–9):

First. Want of substance or equity.

Second. Want of jurisdiction.

Third. Want of necessary parties.

The demurrer was sustained and a decree entered dismissing the bill. (Record, pp. 10–18.)

From this decree the complainants appealed to the court of appeals of the District of Columbia, where the decree appealed from was affirmed. (Record, pp. 20–34.)

From that decree of affirmance the complainants have appealed to this court.

The act of July 22, 1854 (10 Stat., 308), established the office of surveyor-general of New Mexico and by section 8 declared that it should be his duty "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico," and make full report on all such claims as originated before the cession of the territory to the United States, with his decision as to the validity or invalidity of each, which report was to be "laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants and give full effect to the treaty of 1848 between the United States and Mexico."

September 11, 1855, a petition was presented to the surveyor-general by "Francisco Lopez and Henry Connelly and Hilario Gonzales, on behalf of themselves and a large number of citizens of the United States, residents of the town of Las Vegas and its vicinity, in the county of San Miguel, Territory of

New Mexico," representing that they and the citizens they represented were the claimants and legal owners of a certain tract of land in said county, "which said land was granted by the provincial deputation of said Territory, in the year A. D. 1835, to Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and José Antonio Casaos, in their own behalf and that of twenty-five other inhabitants of said county," and praying "that their claim and title to said lands be examined as required by law, and that said grant be confirmed to them." The history of this grant, together with copies of documents, both originals and translations, upon which it is based, are to be found in House of Representatives Executive Document No. 14, Thirty-sixth Congress, first session, referred to and quoted from in appellants' brief.

The original petition was presented to the corporation of San Miguel Del Bado March 20, 1835, by Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and Jose Antonio Casaos, "for themselves and in the name of twenty-five men," for "a vacant and uncultivated piece of land commonly known as Las Vegas." This petition was sent by the corporation to the territorial deputation, which body, upon consideration thereof, ordered as follows: The land contained within the boundaries expressed in this petition is granted not only to the petitioners, but also generally to all who may be destitute of lands to cultivate," and directed that the proceedings be forwarded to the political chief to execute the order. The political chief directed the justice of El Bado to proceed according to the

directions of the deputation. The report of the justice sets forth that on April 6, 1835, he made distribution of the lands to the twenty-five individuals mentioned in the original petition "and in general to those who are without lands, not only those within this jurisdiction, but also anyone who may present himself to me who has no occupation." Attached to this report is a "list showing the number of individuals who occupy the new settlement entitled 'Nuestra Senora de los Dolores de Las Vegas,' and showing the number of yards of land each one has received." The list contains the names of thirty-one persons. June 11, 1841, another list was returned showing distributions made to one hundred and eighteen other persons. November 20, 1846, a further distribution was made to twenty-nine others and subsequently, a list containing the names of six others was returned.

This claim and that of the heirs of Luis Maria Baca, covering the same land, were examined by the surveyor-general and his conclusion submitted to Congress in a report headed: "The Heirs of Luis Maria Baca and the Town of Las Vegas." His conclusion was that either of the claims, in the absence of the other, would be a good and valid grant. The act of June 21, 1860 (12 Stat., 71), provided:

> That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor-general in his reports and abstract marked Exhibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February, eighteen hundred and sixty, and numbered from twenty

> to thirty-eight, both inclusive, be and the same are hereby confirmed. * * *

The exhibit referred to shows the names of claimants of the various claims, and as to No. 20 they are "Town of Las Vegas and Thomas Baca et al." The claimants under the Baca grant having signified a willingness to surrender their elder claim, provision was made for them in section 6 of said act of June 21, 1860, wherein it is provided:

> That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, etc.

A survey of the grant thus confirmed was made and the plat thereof approved by the surveyor-general December 8, 1860. The matter thus rested until 1887, when the then surveyor-general expressed the opinion that the survey formerly made included more ground than could be legitimately embraced in said grant. Thereafter various proceedings were had in the land department and in the courts, as set forth in 27 Land Decisions, 683, which resulted in the decision of the Secretary of the Interior there reported, holding "that said grant was confirmed to the town of Las Vegas for the full quantity of land embraced within the boundaries set forth in the original petition," and directing the issuance of a patent in accordance with the views therein expressed. The present proceedings were instituted to prevent the execution of the order so made.

ARGUMENT.

I.

COMPLAINANTS NOT ENTITLED TO EQUITABLE RELIEF.

They have failed to make it appear that the action which they seek to prevent will work any serious harm to them or any injury for which an adequate remedy can not be obtained in a court of law. They do not present a condition which entitles them to the writ of injunction.

Section 2447 of the Revised Statutes, which took effect December 1, 1873, and which speak from that date where not otherwise specifically provided, directs:

> In case of any claim to land in any State or Territory which has *heretofore* been confirmed by law, and in which no provision is made by the confirmatory statute for the issue of a patent, it may be lawful, where surveys for the land have been or may hereafter be made, to issue patents for the claims so confirmed upon the presentation to the Commissioner of the General Land Office of plats of survey thereof duly approved by the surveyor-general of any State or Territory, if the same be found correct by the Commissioner. *But such patents shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land.*

This section was taken from the act of December 22, 1854 (10 Stat., 599), and may be, also, from the some-

what similar provision in the act of March 3, 1869 (15 Stat., 342), but since the revision the word "heretofore" as employed in the section obviously refers to the period of time preceding the taking effect of the revision. Had it been intended to limit the operation of the section to confirmations made prior to December 22, 1854, that date would have been inserted in the section as carried into the revision instead of the word "heretofore." This was the course pursued in other instances.

The act of June 21, 1860 (sec. 4), contains an express provision, as follows:

> That the foregoing confirmation shall only be construed as quitclaims or relinquishments on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever.

Any patent that may be issued upon such confirmation would necessarily be subject to the same limitations, whether expressly set forth therein or not. It is immaterial, therefore, whether the patent in this case is to be issued under section 2447, Revised Statutes, or under the act of March 3, 1869. The character of the duties to be performed and the effect of the patent to be issued are the same. In neither case would any valid adverse right of any person be affected. Any such right could be asserted before any proper tribunal just as effectually as if such patent had not been issued. Appellants cite no authorities to the contrary, and there are none.

II.

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA WAS WITHOUT JURISDICTION.

That the duties to be performed by the officers of the land department in connection with this grant involved the exercise of discretion and were therefore not merely and purely ministerial in character, is abundantly demonstrated by the facts. Two parties, the town of Las Vegas and Marcos Maese and others, as original grantees or their representatives, applied for patent. To ascertain the merits of the claims thus presented, required investigation extending not only to the confirmatory act, but to the report of the surveyor-general referred to in said act, and all the documents accompanying that report. To determine the rights of the respective claimants, it was necessary to construe the confirmatory act in the light of the reports and documents before Congress, which involved a decision as to the legal effect of such papers. Can it be said that these acts were merely ministerial? The decisions of this court cited by the complainants in support of their contention that the duty devolved upon the officers of the land department in this case are of the character that their manner of performance may be controlled by the courts is not sustained.

The cases of *Stoddard* v. *Chambers* (2 How., 284) and of *United States* v. *Stone* (2 Wall., 525) involved questions as to the effect of a patent already issued and claimed to have been issued contrary to law through inadvertence or mistake. No question of con-

trolling the action of executive officers in the issuing of patents was involved or discussed.

The case of *Stoddard* v. *Chambers* was ejectment, brought by plaintiff, who claimed under a Spanish concession confirmed by act of Congress, against a defendant who claimed under a patent issued upon a New Madrid location made under a Congressional enactment. The Spanish concession was, of course, the elder claim, but the New Madrid location was made and patent issued thereon before the confirmation by Congress of the concession. Lands included within such Spanish concessions were not subject to location with New Madrid certificates. In declaring the inconclusiveness of a patent issued for land not subject to appropriation under the law under which the patent is issued the court said (p. 318):

> No title can be held valid which has been acquired against law; and such is the character of the defendant's title, so far as it trenches on the plaintiff's. It has been argued that the first patent appropriates the land and extinguishes all prior claims of inferior dignity. But this view is not sustainable. The issuing of a patent is a ministerial act which must be performed according to law. * * * It is true a patent possesses the highest verity. It can not be contradicted or explained by parol, but if it has been fraudulently obtained or issued against law it is void. It would be a most dangerous principle to hold that a patent should carry the legal title though obtained fraudulently or against law. Fraud vitiates all transactions. It makes void a judgment, which is

> a much more solemn act than the issuing of a patent. The patent of the defendant having been for land reserved from such appropriation, is void.

United States v. *Stone* was a suit to cancel a patent issued for land which was at the time embraced in a military reservation and therefore not subject to disposition. On behalf of the patentee it was contended (p. 529):

> The principal case in which the jurisdiction of chancery is affirmed to annul patents, at the suit of the sovereign, is put upon the ground of fraud practiced by the patentee. This is believed to be the only ground upon which the courts of chancery have heretofore taken jurisdiction in such cases. Admitting, however, that if the land were within the boundaries of any military reservation, a mere grant of it might be voidable, yet where the Commissioner of the General Land Office and the President declare, as they do here, that *they are acting "in conformity with the provisions of the treaty"* which authorizes grants only of lands *not* in such reservation, then the Government is concluded. It is estopped to say that the land was in a military fort. The discretion of saying what portion of these lands was open to patent is vested by the Government in its officers, and the discretion having been exercised honestly, the decision is conclusive upon the Government.

It was in response to this that the court said (p. 535):

> Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents

> are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and reqires the judgment of a court.

True, in each of these decisions the issuance of a patent is spoken of as a ministerial act, but the court did not mean by this that the issuance of a patent does not involve investigation or the exercise of judgment and discretion, or indeed that it is not a *quasi* judicial act. What was meant—and the decisions do not leave the matter in doubt—was that the issuance of a patent is not such a judicial act that, right or wrong and whether in conformity with or opposition to the law, it is conclusive upon the Government and adverse claimants. What was said and done by the court, and all that it could do or say under the facts in the cases before it, was that when the executive officers have proceeded to the accomplishment of the matter pending before them, then may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States. The action of the court fully

conforms to the rule repeatedly announced and applied in the cases hereinafter cited.

In the case of *Roberts* v. *United States* (176 U. S., 221) it was sought to compel, by mandamus, the Treasurer of the United States to pay interest due upon certain bonds. In the course of that decision it was said (p. 229):

> The law relating to mandamus against a public officer is well settled in the abstract, the only doubt which arises being whether the facts regarding any particular case bring it within the law which permits the writ to issue where a mere ministerial duty is imposed upon an executive officer, which duty he is bound to perform without any further question.

It was held that there the statute was clear and the duty of the Treasurer to pay the money to the relator was ministerial in its nature. If in that case there had been two parties claiming the money, as here there are two claiming the patent, and the Treasurer had decided which was entitled thereto, a very different question, but one more nearly like that presented here, would have been involved, and we venture, with great confidence, the assertion that the court would not have interfered by injunction or mandamus to control the action of the Treasurer and to compel him to reverse that decision.

Here the defendants have not refused to act, and hence there is no ground on that score for interference by the courts. On the contrary, they have, after a full examination of a large record involving complex

questions, decided that the patent should issue to the town of Las Vegas, one of the two claimants. It is now sought to substitute the judgment of the court for that of the executive officers. In the case of *Roberts* v. *United States* (*supra*) the court referred to the case of *United States* v. *Black* (128 U. S., 40) as stating the rule governing in such matters, and said:

> This case comes within the exception stated in the *Black case*, that where a special statute imposes a mere ministerial duty upon an executive officer, which he neglects or refuses to perform, then mandamus lies to compel its performance; but the court will not interfere with the executive officers of the Government in the exercise of their ordinary official duties, even when those duties require an interpretation of the law, the court having no appellate power for that purpose.

It is thus seen that the cases where the courts will interfere are within the exception rather than within the rule. It is submitted that this case is within the rule rather than the exception, and that the court below committed no error in refusing to interfere.

It has frequently been sought to have the courts interfere in such cases by mandamus, and the principles involved will be found to have been discussed in many cases of that character, while there are comparatively few where the remedy has been sought by way of injunction. The same doctrine, however, applies in both classes of cases. In the case of *Gaines* v. *Thompson* (7 Wall., 347) it was asked that the Secretary of the

Interior and the Commissioner of the General Land Office be prevented by injunction from canceling an entry under which Gaines and others claimed an equitable right to certain lands. The court, after referring to a number of cases where the extent of the jurisdiction of courts over officers of the Executive Departments of the Government had been discussed, including *Marbury* v. *Madison* (1 Cranch, 137); *McIntire* v. *Wood* (7 Cranch, 504); *Kendall* v. *United States* (12 Peters, 524); *Decatur* v. *Paulding* (12 Pet., 497); *Commissioner of Patents* v. *Whitely* (4 Wall., 522); *United States* v. *Seaman* (17 How., 225); *United States* v. *Guthrie* (17 How., 284), and *United States* v. *Commissioner of Land Office* (5 Wall., 563), said:

> It may, however, be suggested, that the relief sought in all those cases was through the writ of mandamus, and that the decisions are based upon the special principles applicable to the use of that writ. This is only true so far as these principles assert the general doctrine, that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to

> interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus.
>
> In the one case the officer is required to abandon his right to exercise his personal judgment and to substitute that of the court by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction.

It is not necessary to enter here upon a detailed statement of what has been said in the decisions of this court in the numerous cases coming before it in which the question under consideration was involved. In the case of *Redfield* v. *Windom* (137 U. S., 636, 643) the cases preceding it are named and the rule is clearly stated. It was there said:

> The principles upon which persons holding public office may be compelled by a writ of mandamus to perform duties imposed by law have been distinctly defined and strictly adhered to in a great number and variety of cases before this court. (*Marbury* v. *Madison*, 1 Cranch, 137; *Kendall* v. *United States*, 12 Pet., 524; *Decatur* v. *Paulding*, 14 Pet, 497; *Brashear* v. *Mason*, 6 How., 92, 101; *Goodrich* v.

Guthrie, 17 How., 284; *Ex parte De Groot*, 6 Wall., 497; *Georgia* v. *Stanton*, 6 Wall., 50; *Gaines* v. *Thompson*, 7 Wall., 397; *United States* v. *Seaman*, 17 How., 225, 230; *Ex parte Bradstreet*, 7 Pet., 634; *Harrington* v. *Holler*, 111 U. S., 796; *Reeside* v. *Walker*, 11 How., 272, 290; *United States* v. *Schurz*, 102 U. S., 378, 394, 395; *Butterworth* v. *Hoe*, 112 U. S., 50; *United States ex rel. Dunlap* v. *Black*, 128 U. S., 40.)

The principle is that the writ of mandamus may issue where the duty which the court is asked to enforce is plainly ministerial, and the right of the party applying for it is clear and he is without any other adequate remedy; and it can not issue in a case where its effect is to direct or control the head of an Executive Department in the discharge of an executive duty involving the exercise of judgment or discretion. The doctrine to be gathered from these cases, as well those in which mandamus was granted as those in which it was refused, especially from the two leading cases, *Kendall* v. *United States*, *supra*, and *Decatur* v. *Paulding*, *supra*, is thus enunciated in *United States ex rel. Dunlap* v. *Black*, *supra*, by Mr. Justice Bradley, who delivered the opinion of the court:

The court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is

imposed upon them—that is, a service which they are bound to perform without further question—then if they refuse, a mandamus may be issued to compel them (p. 48).

It is proper here to remark, as applicable to the determination of this case, that, in the extreme caution with which this remedy is applied by the courts, there are cases when the writ will not be issued to compel the performance of even a purely ministerial act. In a case, for instance, where the intention of the officer, though acting within the scope of his duty, had been frustrated by a clerical mistake (*United States* v. *Schurz*, *supra*), or where the case is one of doubtful right (*New York Life and Fire Ins. Co.* v. *Wilson*, 8 Pet., 291, 302), or in a case where the relator having another adequate remedy, the granting of the writ may in this summary proceeding affect the rights of persons who are not parties thereto, or where it will be attended with manifest hardship and difficulties (*People* v. *Forquer*, Breese [1 Ill.] 68, (2d ed., 104); *Van Rensselaer* v. *Sheriff of Albany*, 1 Cowen, 501, 512; *Oakes* v. *Hill*, 8 Pick., 46).

In the case of *Brown* v. *Hitchcock* (173 U. S., 473), the same doctrine is asserted. In delivering the opinion of the court Mr. Justice Brewer, among other things, says:

As a general rule, no mere matter of administration in the various Executive Departments of the Government can, pending such administration, be taken away from such departments and carried into the courts; those departments must

> be permitted to proceed to the final accomplishment of all matters pending before them. And only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States.

The principles thus announced have been strictly adhered to in all subsequent cases. Applying the rules to the case under consideration, it will be found that it is one in which the courts should not and will not attempt to control the action of the executive officers.

III.

THERE IS A FATAL DEFECT OF PARTIES.

Even if this case were one which the court might, so far as the subject-matter is concerned, take jurisdiction of, yet the bill here is fatally defective because of the lack of proper and necessary parties. The bill alleges that the decision complained of, and the execution of which it is sought to prevent, was rendered upon a petition filed in the Interior Department asking that a patent be issued to the town of Las Vegas. The decision referred to (27 Land Decisions, 683) shows that there were conflicting claimants for said patent, and that it was rendered after a consideration of the respective petitions of the parties and of elaborate arguments, both oral and printed, in support of such petitions. In the face of these facts it is asked that the decision be vacated and set aside without notice to the other party to the controversy. Notwithstanding the strenuous contention of complainants that the case of *Litchfield* v. *Register and Receiver* (9 Wall., 575), cited in defendants' argument before

the court of appeals and referred to in the decision of that court, is not in any manner analogous to the present case, we insist that there are so many points of similarity as to justify reference thereto. In that case the register and receiver had no real interest in the matter, and in this case the defendants have no real interest. That case involved the performance of a duty cast by law upon the register and receiver, and this involves the performance of a duty by the defendants. There adversary parties had presented their claims to the officers, and here adversary parties have presented their claims. There the court refused to interfere to control the action of the officers, and here the lower courts have refused to interfere to control the action of the defendants. It is respectfully submitted that here, as there, the action of the lower courts should be affirmed.

Other cases were cited to the court of appeals in support of the proposition that the bill here is open to the objection that the necessary parties have not been brought into court, being *Shields* v. *Barrow* (17 Howard, 130, 139); *Coiron* v. *Millandon* (19 Howard, 113); *Ribon* v. *Railroad Companies* (16 Wall., 446, 450); *Williams* v. *Bankhead* (19 Wall., 563); *Kendig* v. *Dean* (97 U. S., 423); *California* v. *Southern Pacific Railroad Company* (157 U. S., 229); *New Orleans Water Works Company* v. *New Orleans* (164 U. S., 471, 480). In the case last cited it is said:

> It appears from the bill of complaint—the facts therein set forth being admitted by demurrer—that the city of New Orleans has by

ordinances granted to a large number of corporations, associations, and individuals the privilege of laying pipes in its streets for the purpose of conveying water to their respective premises from the Mississippi. These ordinances, the plaintiff contends, are in derogation of its rights and privileges as heretofore declared and adjudged by this court in the *Rivers and St. Tammany cases.* None of the parties for whose benefit the ordinances above referred to were passed were brought before the court or given an opportunity to be heard. Nevertheless, the plaintiff seeks a decree not only declaring those ordinances to be null and void, but requiring the city, within a named time, to recall, expunge, repeal, and cancel each ordinance that does not relate to premises contiguous to the Mississippi River, and if the city does not, within such time and in some public way, cancel and annul those ordinances, then that the court, in this suit, shall adjudge and decree them to be null and void as illegally interfering with the rights of the plaintiff.

We do not suppose that any precedent can be found that would justify a court of equity in giving such relief. A decree declaring the ordinances in question void would have no effect in law upon the rights of the beneficiaries named in the ordinances; for, in the absence of the parties interested and without their having an opportunity to be heard, the court would be without jurisdiction to make an adjudication affecting them. Such a decree would appear, upon the very face of the record, not to be due process of law, and could be treated every-

where as a nullity. (*Winsor* v. *McVeigh*, 93 U. S., 274, 277; *Pennoyer* v. *Neff*, 95 U. S., 714, 733; *Scott* v. *McNeal*, 154 U. S., 34, 46.)

There is striking similarity between that case and the one at bar. There the plaintiffs sought to have it declared that an ordinance of the city of New Orleans conferring certain privileges upon third parties was without authority of law and void because it violated vested rights of the plaintiffs. Here the plaintiffs seek to have it declared that a decision of the Secretary of the Interior directing that a patent be issued to third parties is without authority of law and void because it violates vested rights of the plaintiffs. There the plaintiffs sought to have the city directed to recall and repeal the ordinance. Here the plaintiffs seek to have the Secretary of the Interior directed to recall his decision and to cause a patent to be issued to them. There those for whose benefit the ordinance was passed were not made parties to the bill. Here those in whose favor the patent is directed to be issued are not made parties. There it was held that in the absence of those for whose benefit the ordinance was passed, and without their having an opportunity to be heard, the court could not grant the relief sought. Here it should be held that in the absence of the town of Las Vegas, to which the Secretary's decision directs that the patent be issued, and without the town having an opportunity to be heard, the court can not grant the relief sought.

A decree granting the relief sought by plaintiffs, rendered in the absence of the town of Las Vegas,

could not be interposed by the defendants as a defense to a like suit by or on behalf of the town, such as *Smith* v. *Reynolds* (9 App. D. C., 261). A court of equity will not thus subject these defendants to the alternating and vexatious suits of adverse claimants for a patent to the same land, but will decline to render a decree at the instance of one adverse claimant in the absence of the other which so far involves and depends upon the rights of the absent one as to leave the entire matter open to further litigation, not only between the defendants and the absent claimant, but also between the claimants themselves. What would be accomplished or settled by such a decree? Of what utility would it be?

It is true that the town would not be precluded by the issuance of a patent to complainants in pursuance of such a decree, and it is equally true that the issuance of patent in pursuance of the decision of the Land Department would not preclude the complainants or prevent the submission of their claim to the proper tribunal. Under these conditions the court should not, in the absence of one of the parties to the controversy, set aside a decision of the executive officers rendered in a controverted case when the only effect would be to shift the burden of attack and to place it upon one who has had no notice of the proceedings to secure that result. If a decree commanding the issuance of a patent to the complainants will not affect the town of Las Vegas to such an extent as to make it an indispensable party to the present bill, it necessarily follows

that the issuance of a patent to the town, in pursuance of the Secretary's decision, will not affect the complainants' interests to such an extent as to entitle them to the interposition of a court of equity to prevent the issuance of a patent to the town.

The complainants seek to avoid this objection to their bill by asserting that there was not at the time of the confirmation, and is not now, any town of Las Vegas capable of receiving title to real property. That question is discussed in another portion of this brief, but even if it be decided in favor of the complainants it would not meet the objection now being made. It is admitted that there is a place designated as Las Vegas where there is a large collection of people—that is, that the town has and had a physical existence. In speaking of this point the court of appeals said (record, p. 28):

> But whether the town of Las Vegas be a municipal corporation, incorporated by virtue of statutory provision or not, is quite immaterial, so far as this case is concerned. In such case as this it would be sufficient that such a number of the proprietors claiming under the grant embracing the town, or of those holding rights thereunder, were brought before the court as would fairly represent the interest of all, the interests being of a common character and responsibility. This principle is established by many authorities, and is treated at large, with the citation of cases, in Story's Equity Pleading, in sections 116 to 126. * * *

Moreover, documents accompanying the report of the surveyor-general show that there are parties inter-

ested in this grant whose interests are of the same character and of equal merit with those of the complainants, but who are not parties either as complainants or defendants in this suit. The bill alleges (Record, p. 2):

> On the 6th day of April, 1835, Jose Jesus Ulibarri, constitutional justice, went upon the ground with the parties, exhibited to them the original petition praying for the grant, pointed out the boundaries as set forth in the petition, and placed them in complete and full possession of all the land contained in said grant; whereupon said grant became and was in all respects valid, and all the land included within the exterior limits of said grant then and there became and was segregated from the public lands of Mexico and of the Territory of New Mexico, and then and there became the private property of said individual grantees, and has ever since *hereto* been and still is the private property of said grantees, their heirs, and lawful assigns.

The fact is, as shown by the papers connected with this grant and submitted to Congress by the surveyor-general, and therefore so presented as to permit the court to take notice thereof, that at various times after the 6th day of April, 1835, and prior to the cession to the United States, lands were set apart and distributed to other parties to the number of at least 153. (H. R. Ex. Doc. 14, Thirty-sixth Congress, first session.) These parties are not mentioned in the bill, but their claims are necessarily denied by the statement quoted above, that the land in question became the private property of the 31 people pres-

ent at the distribution of April 6, 1835, and still is the private property of their heirs and assigns. Should this bill be entertained in the absence of parties thus shown to have an interest in the subject-matter? It is confidently believed that this question must be answered in the negative.

IV.

APART FROM THE MATTERS BEFORE DISCUSSED, COMPLAINANTS' CASE IS WITHOUT MERIT.

A. *The court will not accept complainants' statement of the effect of the act of June 21, 1860.*

It was contended in the courts below that the act of June 21, 1860 (12 Stat., 71), confirming the claim in question, is not a public act, and that the court can not take judicial notice of it. Their position was that, in the consideration of the pending demurrer, the court must accept the statements in the bill as to the force and effect of that act, and can not examine the act to determine whether the bill properly characterizes and describes it. This position is not insisted upon in the brief filed here, and it may be, therefore, that they have concluded to abandon that proposition. The rule is that the insertion in an act, otherwise private, of matter of a public nature renders the act public and subjects it to judicial notice by the courts. (Sutherland on Statutory Construction, sec. 193, and authorities there cited.) This act of 1860 deals with the public lands, as well as with the confirmation of Mexican claims, in that by the sixth section it is provided that one of the claimants for the land involved in this case should, upon relinquishment of that claim, be

allowed to select an equal quantity of vacant land in the Territory of New Mexico.

Another reason why the act of 1860 should be treated as public is that it was passed in discharge of a public political duty resting upon the United States under its treaty with the Republic of Mexico, which is a public law of the land of which the courts must take judicial notice. The acts were thus passed in maintenance of the national honor and in fulfillment of the pledges of national faith given to the Government from which we obtained the territory in which these private claims are located. In this sense such acts are matters of national concern and affect the whole community. In *Tameling* v. *United States Freehold, etc., Company* (93 U. S., 644, 661), Mr. Justice Davis, in delivering the opinion of the court, says:

> We have repeatedly held that individual rights of property in the territory acquired by the United States from Mexico were not affected by the change of sovereignty and jurisdiction. They were entitled to protection, whether the party had the full and absolute ownership of the land or merely an equitable interest therein which required some further act of the Government to vest in him a perfect title. The duty of providing the mode of securing them and fulfilling the obligations which the treaty of cession imposed was within the appropriate province of the political department of the Government.

Whatever may be the character of this act, the complainants have referred to it as the basis of their claim

and thus presented it for the consideration of the court. This is true also of the documents, reports, and decisions referred to by them. Outside of all this, however, facts connected with this grant, which are recited in the statutes and the records of the Interior Department, are matters of which the court can take judicial notice. In *Knight* v. *Land Association* (142 U. S., 161, 168–169), Justice Lamar, in making the statement of the case, said:

> To understand precisely the exact nature of the questions involved in this case a somewhat more detailed statement of facts than is contained in the above findings of the referee will be found useful. These facts are not contradictory of those findings, and are recited in former decisions of this court, statutes of the United States and of the State of California, and the records of the Interior Department, of all of which the court can take judicial notice.

The demurrer did not admit as true any allegation in the bill as to the construction or legal effect of this statute, the documents named, or the official acts of the officers of the Government. That is a matter for the court to determine.

B. A consideration of the act of June 21, 1860, and of other matters of which the court takes judicial notice, shows that the claim in question was confirmed to the town of Las Vegas.

It is urged by plaintiffs that the town of Las Vegas is a legal nonentity—that is, that it is not incorporated

and therefore does not have the legal capacity to receive or hold the confirmed title to this claim. That the town has a physical existence now, that it had such an existence at the time of the confirmatory act, and that its establishment was contemplated by the Mexican grant, are not questioned by the bill. By the United States census, of which the court takes judicial notice, Las Vegas had a population of 1,550 in 1850 and 1,094 in 1860. Corporate capacity is not essential to the granting or confirming of lands or other rights to any community, but if it were, the act of Congress confirming this grant to the town gives it the necessary capacity. New Mexico was at the time of the confirmatory act a Territory of the United States, over which Congress had the combined legislative power of a State and the National Government. In *National Bank* v. *County of Yankton* (101 U. S., 129, 132), it is said:

> It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded. The act to adapt the ordinance to provide for the government of the Territory northwest of the river Ohio to the requirements of the Constitution (1 Stat., 50) is chapter 8 of the first session of the First Congress, and the ordinance itself was in force under the Confederation when the Constitution went into effect. All territory within the jurisdiction of the United States not included in any

State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the Territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the Territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial legislature valid and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.

The existence of the town of Las Vegas was in terms recognized by the sixth section of the confirmatory act.

It was within the power of Congress to give, and it did give, to the town whatever capacity was necessary to make it the recipient of the intended confirmation. In Dillon's Municipal Corporations, vol. 1, 4th ed., sec. 43 (old sec. 22), it is said:

> If powers and privileges are conferred upon a body of men or upon the residents or inhabitants of a town or district, and if these can not be exercised and enjoyed, and if the purposes intended can not be carried into effect, without acting in a corporate capacity, a corporation is, to this extent, created by implication. The question turns upon the intent of the legislature, and this can be shown constructively as well as expressly.

In vol. 2, sec. 560 (old sec. 431), the same author further says:

> But a grant by the State, or by the sovereign authority having the right to create corporations, to one or more persons who are named as patentees, for themselves and the inhabitants of a designated town, is valid, because the grant itself, coming from this source, confers a capacity to take and hold the lands in a corporate character.

C. *That the town of Las Vegas is the confirmee designated by Congress is believed to be clearly shown in the following departmental decisions relating to this claim.*

In his decision of December 5, 1891 (13 Land Decisions, 646, 655), Secretary Noble said upon this point:

> My opinion is that * * * the confirmation was made direct to the town, not only as

the most convenient form of making said confirmation and issuing patent thereon, but because the town of Las Vegas, acting in the interests and for the benefit of its people, was the proper party to ask for and receive from Congress the relief sought.

* * * A patent for said lands should be issued * * * to the town of Las Vegas, so that the proper parties in interest could perfect their titles to their lands. * * *

The conclusion as to patent arrived at herein seems somewhat to conflict with the views of my predecessor in the Anton Chico case, reported in 1 L. D., 287 (rev. ed.). I have not the entire record in that case before me, and the opinion does not disclose the facts sufficiently to enable me to determine whether they are identical in the two cases. But even if they are the same, I believe it to be my plain duty to cause the patent to issue in the name of the Congressional confirmee—the town of Las Vegas—rather than to other parties not named as confirmee.

As to the point that the town of Las Vegas, not having been incorporated, is a legal nonentity, to which no title would pass under the patent, it may be replied that, if this be true, as a matter of fact and law, the consequences would be more far-reaching; for Congress, in its wisdom, confirmed the grant, as shown, to the said town, and if there be no such town in existence which can take there simply has been no confirmation of the grant, and nobody is as yet entitled to a patent. But I do not understand this to be the law of this case.

Under the Mexican system, originally the people were required, for self-protection and other reasons, to live in towns while cultivating outlying land, and the general laws of that country gave to such towns or pueblos four square leagues of land for the use of the inhabitants thereof, and occasionally by special concession, as in the present instance, grants of larger area were made for the same purpose. None of these towns were ever incorporated, in the sense in which we use the term, so far as my research has gone. They were aggregations of people who lived together for mutual protection, and under the laws and customs of that country had officers for the administration of their municipal affairs; but there was no actual charter—no act of incorporation conferred by the superior power of the State—only the implication arising from the recognition of the existence of such towns, with authority to guide their town affairs.

This was the condition of things when New Mexico was acquired by the United States, and the legal status of these towns and their capacity to take as confirmees of grants of public lands have been recognized in too many instances by Congress and the Executive Departments through too long a period of time to be now seriously questioned.

In the case under consideration the town of Las Vegas was not in existence at the time the original grant was asked for by Maese and his associates. One of the purposes for which the concession was made was to establish that town, and it was established after the manner and

under the laws of Mexico, and has had an actual existence ever since. Congress recognized its legal and actual existence, ignored the original petitioners for the grant and confirmed it to the town, and to that extent made a change in the trustee. In view of all this it is too late now to say that Las Vegas has no legal existence. If a corporate capacity be necessary to enable the town to take under the grant, every presumption must be that it has the necessary corporate capacity, and the law so implies (Dillon on Municipal Corporations, par. 21 and 22). At all events, the town having an actual existence, this Department will not challenge its capacity to take what Congress clearly intended to give.

In passing upon a motion for review of the decision just cited, Secretary Noble further said (15 L. D., 58):

It is strongly insisted that it was error to conclude that the patent should be issued to the town of Las Vegas, because there was no such town in existence at the date the grant was made. If, however, the grant was confirmed to the town, that action of Congress must control this Department. Whether such confirmation was proper or effective is a question that will not be determined here. That the intention of Congress was to confirm the grant to the town of Las Vegas is, in my opinion, clearly disclosed, not only by the reference made to Exhibit A, by which Congress adopted the designation there given of said claim, but also by the whole tenor of the record made while the consideration of the confirmatory act was

progressing, special reference being had in this connection to the report of the Senate committee referred to and quoted from in the former decision. The conclusion reached in that decision and the course to be followed to carry it into execution is one, if not the only, practicable way in which the interest of all parties may be fully protected. It is virtually conceded by the attorneys for the parties now seeking the revocation of the decision of December 5, 1891, that equitable rights in some portions of the property have been acquired "by possession or otherwise," and that such rights should be fully protected. They even profess a readiness and willingness to release their claim to the land within the town of Las Vegas and also of East Las Vegas, and to a large tract surrounding said towns, and to convey the same by quitclaim deed "to the proper legal authorities thereof in the interest and for the benefit of the inhabitants thereof." This proposition can not be seriously entertained even had these parties, which they have not, tendered a formal instrument in furtherance thereof. Indeed, submission of such a proposition is inconsistent with the various allegations made by them as to the effect of conveying the legal title to the town by the Government. It is said in one place: "There was no such town in legal existence at the time of the grant, when the title vested, and there is none now." Again: "But we earnestly oppose the issue of the patent to the 'town of Las Vegas,' because no one can know what is meant thereby." And again: "Our chief objection to the last-named patentee (town of Las

Vegas) is simply that, in such case, no one could find the proper party on whom to serve process to begin a suit for the determination of the ultimate rights of property in the lands patented."

If all these uncertainties and inconveniences would, in their opinion, follow the issuing of a patent in the name of the town, they must believe the same would attach to any title vested in the town by the conveyance proposed. Again, it is said that under a patent issued as they ask, in the names of those asserted by them to have been the original grantees, "any right, legal or equitable, arising under the original grant or subsequent conveyances can be directly asserted, with justice to all and injury to none. It inures to the benefit of the smallest landowner on the grant, and the alleged 'town of Las Vegas' as well." Why all parties would be fully protected if patent should issue as they request and not if it shall issue as directed in the decision complained of is not readily seen, nor am I convinced by the arguments put forward that such is a fact. On the contrary, I am convinced that individual rights and equitable claims may be more readily and surely protected with the legal title so placed that the holder thereof would have no interest in defeating just claims than with it in the hands of individuals whose personal interest would be enhanced by defeating all claims other than their own.

The decision complained of affords to all rightful occupants of the land granted equal and

full protection, those who now claim to be or to represent the original grantees as well as those who claim, through the large number of people who were recognized by the Mexican Government as equally entitled to share in the benefits of said grant. That the grant was not made for the exclusive benefit of those whose names are mentioned as the petitioners therefor is conclusively shown by the history of the governmental action in relation thereto. The grant as ordered made by the Territorial deputation was "not only to the petitioners and the residents of El Bado, but also generally to all who may be destitute of lands to cultivate." In carrying into execution the orders of the Territorial deputation, the officer intrusted with that duty recognized not only those who were present on the day the first allotment was made, but also others who afterwards presented themselves. This course was pursued at least so long as the land and the occupants thereof were under the jurisdiction of the Mexican Government, and until the number of beneficiaries had increased to nearly two hundred. This course negatives the idea that it was supposed that a grant in fee was being made for the exclusive benefit of the small number of persons referred to in the original petition. The fact that those original petitioners acquiesced in these later distributions, and that one of them, Juan de Dios Maese, officiated at one of these subsequent distributions, shows that these petitioners themselves did not consider that they had been invested with the fee-simple title of all said lands.

* * * * *

> * * * The history of this grant shows conclusively that it was made for the benefit of all who should see fit to settle thereon, to the end that a town might be established and built up. * * * Congress evidently considered that this intention in making the original grant would be best carried out and individual interest most surely and effectually protected by making the confirmation in the name of the town. However, whatever may have induced the action taken by Congress, it but remains for this Department to carry into execution the legislation enacted, and this can, in my opinion, be done only by issuing the patent in the name of the town, as concluded when the decision complained of was rendered.

In the decision of December 17, 1898 (27 Land Decisions, 683, 687), the execution of which the appellants are now seeking to enjoin, it is said by Acting Secretary Ryan:

> The question as to whom the patent should issue was considered when the matter was before this Department in 1891, and it was then held that it should issue to the town of Las Vegas, inasmuch as the confirmation was made direct to the town. On review it was strongly urged that it was error to hold that patent should issue to the town, but that position was adhered to by the Department. (15 L. D., 58.) The grant as petitioned for was to be to individuals, but as finally made by the territorial deputation provision was made whereby others having no lands should be allowed the same privilege of settling upon the land as those who had petitioned for

the grant. This, like most Spanish and Mexican grants, was made with a view to the establishment of a community for protection against the Indians. It is asserted that the Spanish word "plaza" as used in the papers relating to this grant was erroneously translated "town," as it simply meant a square place. However, that may be, it is certain that the building up of a town was to be expected and actually followed the settlement upon the lands granted. The community was added to until at the time of the cession to the United States more than 200 individuals had been recognized as entitled to share in the benefits of the grant and had been put in possession of tracts of land within the boundaries petitioned for. A town had grown up before the cession to the United States. The petition to the surveyor-general asking for an examination and confirmation of the grant was made by Francisco Lopez, Henry Connelly, and Hilario Gonzales "on behalf of themselves and a large number of citizens of the United States, residents of the town of Las Vegas and its vicinity." The exact interests of the petitioners or the manner in which they became the owners is not set forth. In the report of the surveyor-general, who was by the act of July 22, 1854, *supra*, made a special tribunal to ascertain the origin, nature, character, and extent of such claims and decide as to their validity or invalidity, this grant is spoken of as the "claim of Las Vegas," and in the schedule of cases submitted by him there is a column headed "Names of claimants," and under this head the claimants of No. 20 are designated as

"Town of Las Vegas and Thos. Baca et als." This shows that the surveyor-general regarded the claimant for this grant to be the town.

The Senate committee, in the report heretofore referred to, designate one of the claimants to this grant as "the town of Las Begas or Las Vegas," and say: "This town claims under a grant made on the 25th of March, 1835, to Juan de Dios Maese and twenty-seven others." The act of confirmation, July 21, 1860 (12 Stat., 71), confirmed the claim, with others, as recommended by the surveyor-general. This would be sufficient to justify the conclusion that the confirmation was to the town, but this conclusion is further supported by the fact that, in providing for the heirs of Baca, Congress specifically said that the land to be selected by them should be in place of the land "claimed by the town of Las Begas." It seems clear from all this that the confirmation was intended to be to the town.

The declaration of Congress as to the confirmee is accepted by this Department. If Congress had made a grant to the town of Las Vegas, there would have been no room for discussion as to whom the patent should issue. The Supreme Court has said that an act of confirmation passes the title of the United States as effectually as if it contained in terms a grant *de novo*. *Ryan et al.* v. *Carter et al.* (92 U. S., 78). The title to this land passed by the confirmatory act, and the recipient thereof was the confirmee indicated by the act. This was the town of Las Vegas, and to that confirmee must the patent issue.

That the people composing the town were understood to be the confirmees is shown by various annual reports of your predecessors, where, in giving a list of private land claims, under the heading "confirmee" or "present claimant," the phrase "inhabitants of town" is used. The question as to the proper patentee has been twice considered by this Department, and both times it was held to be the town. (13 L. D., 646; 15 L. D., 58.) By the decree rendered by the supreme court of the District of Columbia in the suit heretofore mentioned it was adjudged that the lands contained in said grant "were absolutely and unconditionally confirmed to the said town of Las Vegas, and that said town became and is the absolute owner thereof in fee." Upon appeal this decree was affirmed by the court of appeals.

It is thus seen that the uniform holding has been that the town of Las Vegas is the confirmee and owner of the lands embraced in this grant.

For the reasons herein set forth it must be held that said grant was confirmed to the town of Las Vegas.

D. *Confirmatory patent must follow act of confirmation. Neither Land Department nor courts can revise action of Congress.*

If plaintiffs claim adversely to the confirmation made by Congress, their rights are fully protected by the provision in the confirmatory act that the confirmation "shall not affect the adverse rights of any other person or persons whomsever;" but if they claim under that confirmation they must receive its benefits through

the confirmee or instrumentality named by Congress—namely, the town of Las Vegas. It is not competent for the Land Department or for a judicial tribunal to review the action of Congress in making the confirmation to the town. In speaking of another confirmation made by the act of 1860, this court said, in *Tameling* v. *United States Freehold, etc., Company* (93 U. S., 644, 662):

> *The final action on each claim reserved to Congress is of course conclusive, and therefore not subject to review in this or any other forum.*

To the same effect is the *Maxwell Land-Grant Case* (121 U. S., 325, 365).

In *Smith* v. *Reynolds* (9 App. D. C., 261, 285) the court of appeals, in considering the Congressional confirmation of this claim, said:

> What Congress has declared must be accepted as conclusive in all matters relating to the disposition of the public lands, whether it be in the form of confirmation of previous grants or the granting of land in exchange for the surrender and relinquishment of prior titles to make good a junior or subordinate grant. Where Congress has acted in either confirming or rejecting a land claim, all other jurisdictions are excluded except where other jurisdiction is expressly conferred.

It is respectfully submitted that the decrees of the courts below were right and should be affirmed.

WILLIS VAN DEVANTER,
Assistant Attorney-General.

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Supreme Court of the United States.

No. 226.—October Term, 1901.

Pablo Maese, José L. Lopez, Dionicio Gonzalez, and Jesus Maria Tafoya, Appellants,
vs.
Binger Herman, Commissioner of the General Land Office of the United States, and Ethan Allen Hitchcock, Secretary of the Department of the Interior of the United States.

Appeal from the Court of Appeals of the District of Columbia.

[January 6, 1902.]

This is a bill in equity brought in the Supreme Court of the District of Columbia, praying for an injunction against respondents from issuing a patent to the town of Las Vegas, New Mexico, of the lands in the Las Vegas private land grant, or, if a patent has issued, to declare it to be void, or if a patent has not issued, to direct one to issue "to all of said lands, to the heirs, legal representatives and assigns of the said Juan de Dios Maese, Manuel Duran, Miguel Archuleta, José Antonio Cassaos, and those who were associated with them as the original grantees and as representatives of said original grantees, and that their title in and to said lands may be quieted, and said plaintiffs pray for such other and further and general relief as they may show themselves entitled to under the law and the facts."

There was a demurrer to the bill, which was sustained, and the complainants declining to amend their bill, it was dismissed. (.)

An appeal was taken to the Court of Appeals, and the action of the Supreme Court of the District was affirmed. (.)

The suit was brought by the complainants as heirs of the original grantees for themselves and others, who, it is alleged, are too numerous to be made parties. The defendants are sued in their official character. The facts as they appear from the bill are that on the 20th of March, 1835, Juan de Dios Maese, Miguel Archuleta, Manuel Duran and José Antonio Cassaos, for themselves and on behalf of twenty-five men, presented a petition to the corporation of El Bado, in the Territory of New Mexico, Mexico, for the grant and possession of the tract of land "commonly known as Las Vegas, on the Galenas River, which was desired for the cultivation of moderate crops and for pasture and watering places." The land was under the jurisdiction of El Bado, and was bounded as follows: "On the north by the Sappello River, on the south by the boundary of the grant of Don Antonio Ortiz, on the east by the Aguage de la Zegua, and on the west the boundary of the grant to San Miguel del Bado."

The tract contains 496,446.96 acres of land, and was afterwards surveyed in 1860, which survey was approved by the surveyor general of New Mexico.

The petition was presented to the territorial deputation, approved by that body on the 23d of March, 1835, and the grant made as asked for with the provision, "that persons who owned no land were to be allowed the same privilege of settling upon the grant as those who petitioned for it, and that 'the pasture and watering places are free to all.'"

On the 24th of March, 1835, the acting governor and political chief of the territory approved the action of the territorial deputation, and directed the constitutional justice of El Bado to place the parties in possession of the lands prayed for. This was done on the 6th of April, 1835.

The heirship or legal succession of the parties to the original grantees is alleged, and that the complainants "are now the true and real owners of undivided interests in said land, the separate interest therein of each being of the full value of not less than ten thousand dollars." The total value of the land is two million dollars.

The treaty and protocol of Guadalupe Hidalgo are invoked, and it is alleged that the surveyor general of New Mexico, under the provisions of the act of Congress of July 22, 1854, (10 Stat. 309,) and acting under the instructions of the Secretary of the Interior and Commissioner of the General Land Office, gave notice to parties claiming grants from Mexico to present their claims, and thereupon Francisco Lopez, Henry Connelly and Hilario Gonzalez, on behalf of themselves and a large number of citizens of the United States, residents of San Miguel County, presented their petition claiming the Las Vegas grant. The surveyor general investigated the claim, found, and reported its validity. His report was approved by Congress and the grant confirmed, "thereby confirming in and to the original grantees named and designated in said Las Vegas grant, their heirs and assigns, their absolute right and title to all of the lands embraced within the aforesaid boundaries and limits, free of all right, title, claim or control upon the part of the United States."

It is the duty of the Commissioner of the General Land Office to issue patents in "all such confirmed private land grants to the grantees named in the original grant, their heirs or assigns, and in the discharge and performance of his duty therein he has no judicial or discretionary powers, but acts ministerially alone in the issuing of such patents."

It is further alleged in the bill that—

"December 17, 1898, upon a petition filed in the Interior Department of the United States, praying that a patent be ordered to be issued to the town of Las Vegas to all the land included in said Las Vegas grant, the Honorable Thomas Ryan, the then acting Secretary of the Interior Department, addressed a letter to the Commissioner of the General Land Office

wherein and whereby the said Interior Department ordered and directed the honorable Commissioner of the General Land Office to issue a patent to said lands to the town of Las Vegas, which order of the Interior Department now remains and continues in full force and effect, not having been set aside, vacated or omitted.

"Said plaintiffs are informed and believe, and upon their information and belief they charge the fact to be, that at the date of the making of said Las Vegas grant, as aforesaid, there was no place of collection of people having any legal existence under the laws, customs or usages of the Republic of Mexico or the Territory of New Mexico known or designated as the town of Las Vegas, nor was there any town by name of Las Vegas on said grant or elsewhere at that time which under the laws in force at that time in the Territory of New Mexico had any legal or corporate existence or which under or by virtue of any law, custom or usage in force in New Mexico could take or acquire title to lands.

"And said plaintiffs allege and charge further that said land grant was not made to any town by name of Las Vegas or by any other name; that the town of Las Vegas nor any other town ever petioned the surveyor general of New Mexico to investigate the nature, character, extent or validity of said grant, and that the only petition ever preferred to any surveyor general for such an investigation touching said grant was preferred by individuals representing the original grantees, Juan Dios Maese et al., their heirs and assigns, the same hereinbefore referred to. They aver further that said surveyor general reported that said grant was made in due form to Juan Dios Maese and his associates, and was to them a valid grant, and plaintiffs aver that said grant was duly and legally confirmed by Congress to the original grantees, the said Juan Dios Maese and his associates, and that it was not confirmed to a town by the name of Las Vegas or to any other town. Said plaintiffs further show that they are informed and believe, and upon their information and belief they charge the fact to be, that there was not on December 17, 1898, any town by name of Las Vegas anywhere in the United States having any legal or corporate existence or any defined boundaries, or that could take or acquire title, either equitable or legal, to any lands whatsoever; and, further, that there was not at the time of the cession of the country included in the Territory of New Mexico to the United States by the Republic of Mexico, or at the time of the confirmation by Congress of the United States of said Las Vegas grant, any such town having any legal or corporate existence or having any defined boundaries, or any place by that name capable in the law of acquiring, having or holding title, either legal or equitable, to the lands included within the Las Vegas grant or any other real estate."

It is further alleged that such patent if issued will be a cloud upon the title of plaintiffs and that they have presented their claim to said grant and have requested a patent to be issued to the heirs and assigns of the original grantees, and that their request has been ignored, "and said Commissioner of the General Land Office is now about to issue the patent to said grant to a nonenity called the town of Las Vegas, in violation of law and in violation of the rights of plaintiffs and to their great and irreparable injury, and will do so unless restrained from so doing by this court."

The demurrer to the bill was general, charging want of equity, no jurisdiction of the court over the subject matter, and a defect of parties.

The other facts stated in the opinion are taken from H. Ex. Doc. 14, 30th Cong., p. 36, quoted in the brief of counsel for appellants.

Mr. Justice McKenna delivered the opinion of the Court.

The first and second grounds of demurrer are substantially the same, or depend upon the same arguments. Of the second ground the courts below took different views, the Supreme Court holding that the town of Las Vegas was not and the Court of Appeals holding that the town was a necessary party.

As stated in the bill, the act of July 22, 1854, in execution of the treaty of Guadalupe Hidalgo, required the surveyor general of New Mexico, under the instruction of the Secretary of the Interior, to investigate and report upon the validity of grants of land from the Mexican government On September 11, 1855, a petition was presented to the surveyor general for the examination of the grant of Juan de Dios Maese et al., which stated that it was presented by "Francisco Lopez and Henry Connelly and Hilario Gonzales, on behalf of themselves and a large number of citizens of the United States, residents of the town of Las Vegas and its vicinity, in the county of San Miguel, Territory of New Mexico, represent to your honor that they, and the citizens they represent, are the claimants and legal owners of a certain tract of land lying and being situate in the county of San Miguel, in the Territory of New Mexico."

It also stated the fact of a grant, the boundaries of the grant, and concluded as follows:

"The said claimants cannot show the quantity of land embraced in said grant, except as the same are set forth in the boundaries of said grant, nor can they furnish a plat of survey of said grant, as no survey of said land has ever been executed.

"Your petitioners, the claimants, are also informed and believe that Thomas Cabeza de Baca, for himself and others, are claimants also for the lands embraced in said grant and now claimed by your petitioners. Your petitioners pray that their claim and title to said lands be examined as required by law, and that said grant be confirmed to them; and, as in duty bound will ever pray," &c.

The surveyor general made report of the claim, stating—

"The grant made to Juan de Dios Maese and others is not contested on the ground of any want of formality in the proceedings, but as far as the documentary evidence shows is made in strict conformity with the laws and usages of the country at the time.

"Testimony is introduced to show that the heirs of Baca protested in 1837 against the occupancy of the land by the claimants under the latter grant, and that they went upon the land knowing the existence of a prior grant, but as these matters are not deemed to be pertinent to the case so far as this office is concerned, it is not necessary to comment upon them.

"It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposal of the general government, and that in the absence of the one the other would be a good and valid grant; but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case, is hereby respectfully referred to Congress through the proper channel for its action in the premises."

The claims and thirty-two others which the surveyor general had investigated were submitted to Congress with his report thereon. The claims were designated by numerals from one to thirty-eight, number twenty being the "town of Las Vegas and Thomas Baca et al." (H. Ex. Doc. 14, pp. 42, 45.)

The claims were confirmed by the act of June 21, 1860. (12 Stat. 71–2.) Section 6 of the act is as follows:

"And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: Provided, however, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer. Approved, June 21, 1860. (12 Stat. 71–2.)"

Notice of the confirmation was sent by the Land Office to the surveyor general of New Mexico, and his attention was particularly directed to the sixth section of the act of Congress as follows:

"In this connection I have to draw your special attention to the sixth section of said act of June 21, 1860. . . . This law gives the land to the Vegas town claim, and allows the Baca heirs to take an equal quantity of vacant land, not mineral, in New Mexico, to be located by them in square bodies not exceeding five in number. To give this law timely effect you will give priority, in surveying private land claims, to this claim, particularly as it is in the vicinity—about four miles from the outside of the public surveys. You will proceed to have the exteriors of the Las Vegas town claim properly run and connected with the line of the public surveys. The exact area of the Las Vegas town tract having been thus ascertained, the right will accrue to the Baca claimant to locate a quantity equal to the area of the town tract elsewhere in New Mexico as vacant land, not mineral, in square bodies not exceeding five in number."

The grant was surveyed and a plat was made showing its area to be 496,446.96 acres. A certificate was issued to the Baca heirs for a like quantity of land, which entitled them to locate, and they did afterwards locate that quantity, and the location was sustained by this court. (*Shaw* v. *Kellogg*, 170 U. S. 317.)

On May 4, 1861, the surveyor general reported his action to the General Land Office, and transmitted the survey, field notes and plat. The papers were received and filed in the Land Office and the grant was treated as confirmed for 496,446.96 acres. In the reports of the General Land Office, subsequently made, the tract was named "town of Las Vegas," and the claimants the "inhabitants of the town."

On March 3, 1869, Congress passed an act which provided for the issue of patents for private land claims in New Mexico which had theretofore been confirmed by Congress. Section 2 of the act is as follows:

"And be it further enacted, That the Commissioner of the General Land Office shall, without unreasonable delay, cause the lands embraced in said several claims to be surveyed and platted, at the proper expense of the claimants thereof, and upon the filing of said surveys and plats in his office he shall issue patents for said land in said territory which have heretofore been confirmed by acts of Congress and surveyed, and plats of such survey filed in his office as aforesaid, but for which no patents have heretofore been issued. (15 Stat. 342.)"

It is stated by counsel for appellants that prior to the act of March 3, 1869, the General Land Office was without authority to issue a patent for the lands in controversy. See also *Shaw* v. *Kellogg*, (170 U. S. 342.) That act therefore is the sole authority to the General Land Office to issue the patent, and it would seem not to admit of controversy that the patent must issue to the confirmee of Congress. We think that the town of Las Vegas was that confirmee, and this conclusion relieves us from considering some of the interesting questions discussed by counsel.

The grant originally was as much to a community as to individuals, and a town was contemplated. The decree of the governor directed the selection of "a site for a town to be built by the inhabitants," and the constitutional justice, in executing the decree, informed those to whom he made "the distribution" of the land "that the water and pasture were free to all, and that the joint labor should be done by themselves without any dispute, and that the wall surrounding the town marked out should be made by them all, which, being done, that they notify the justice, in order that he may mark out to each one equally the portion he is entitled to." A town was started and grew and had attained substantial proportions at the time the confirmatory act was passed.

The petition of the surveyor general of New Mexico describes the petitioners as "residents of the town of Las Vegas and its vicinity," and he manifestly regarded it a claim on behalf of the town, stated it from that standpoint and reported it to Congress as a claim by the town of Las Vegas. The claim was confirmed by reference to the report, and the town was especially designated the claimant in section 6 of the confirmatory act That it received confirmation at all may be because it was a claim by a town. Its legality might have been questioned. The claimants in their

petition stated that their claim was disputed by Thomas Cabeza de Baca, and reporting on that dispute the surveyor general said that testimony was introduced to show that the heirs of Baca protested in 1837 against the occupancy of the land by the claimants under the grant to Juan de Dios Maese, and that the claimants "went upon the land, knowing the existence of a prior grant"—the Baca grant. The surveyor general, however, did not assume to decide the dispute between the parties, but referred it to "the proper tribunals of the country" and to Congress. Congress accommodated the dispute by a magnificent donation of lands to the heirs of Baca, and confirmed the original land to the town; and we can easily see that Congress might have exercised its bounty to adjust a controversy to which a town was a party, when, if the contestants were individuals, they would have been remitted to the courts to litigate their rights and priorities. But however this may be, we cannot assume that Congress approved the report of the surveyor general unadvisedly, used the name of the town unadvisedly, or intended primarily some other confirmee.

This interpretation of the act of Congress cannot be changed even if Las Vegas had or has "no legal or corporate existence." If the designated confirmee cannot take, another cannot be substituted in its stead. Nor do we think the capacity of the town to take a patent is open to dispute in the Land Office. Of that capacity Congress was satisfied, and it is not for the Land Department to conceive and urge doubts about it raised upon disputable legal propositions. The town and its inhabitants were certainly substantial entities in fact, and were recognized by Congress as having rights, and directed such rights to be authenticated by a patent of the United States. It is the duty of the Land Office to issue that patent, to give the town and its inhabitants the benefit of that authentication, and to remit all controversies about it to other tribunals and proceedings. It will be observed from this view that the question in the case is narrower than appellants conceive it. It is not what rights they had before confirmation of the grant nor what rights they may assert under or against the patent, but what Congress has done and what it directed the Land Department to do. It is strictly this and nothing more, and on this only we express an opinion.

Decree affirmed.

True copy.

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Clerk Supreme Court, U. S.